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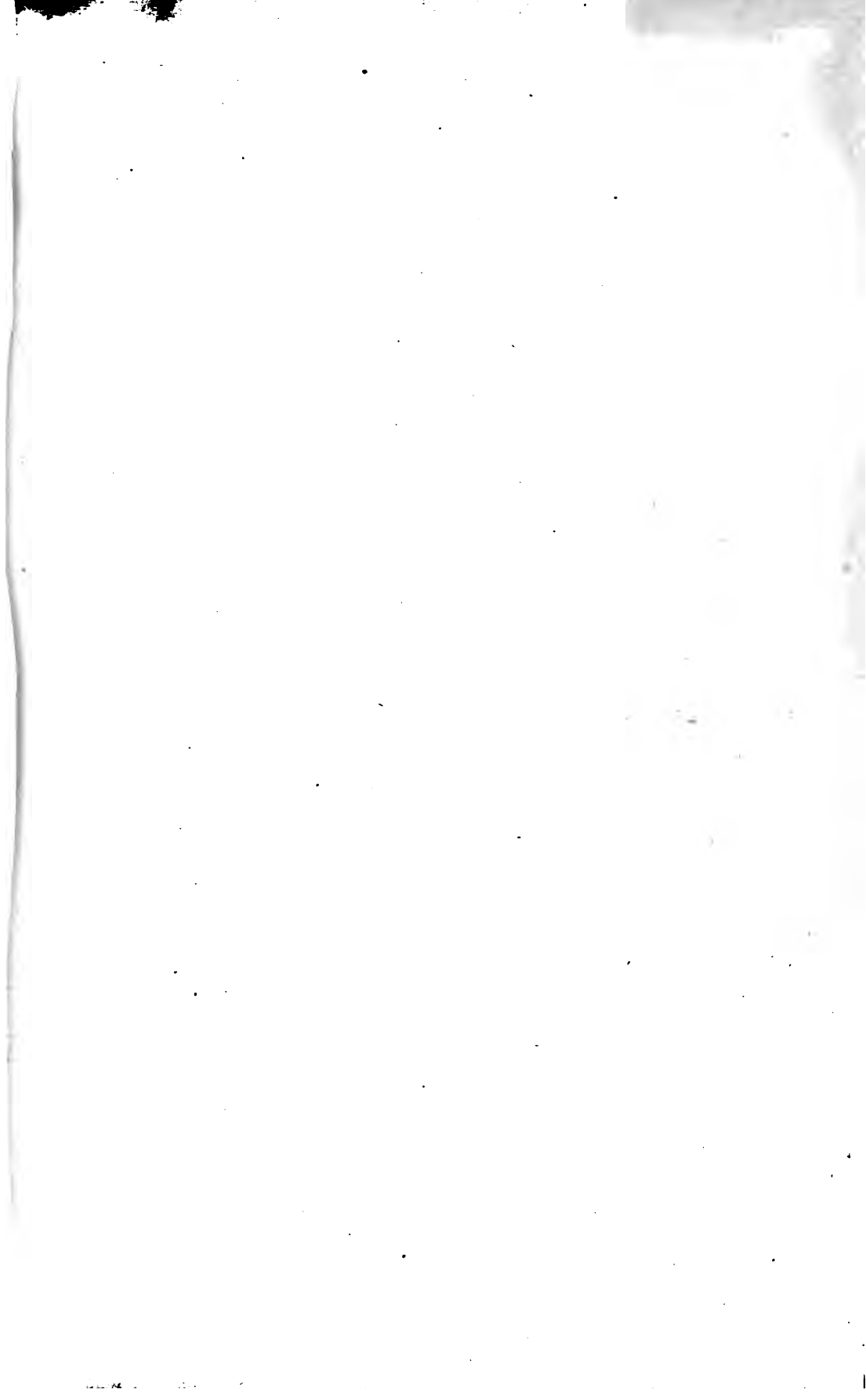
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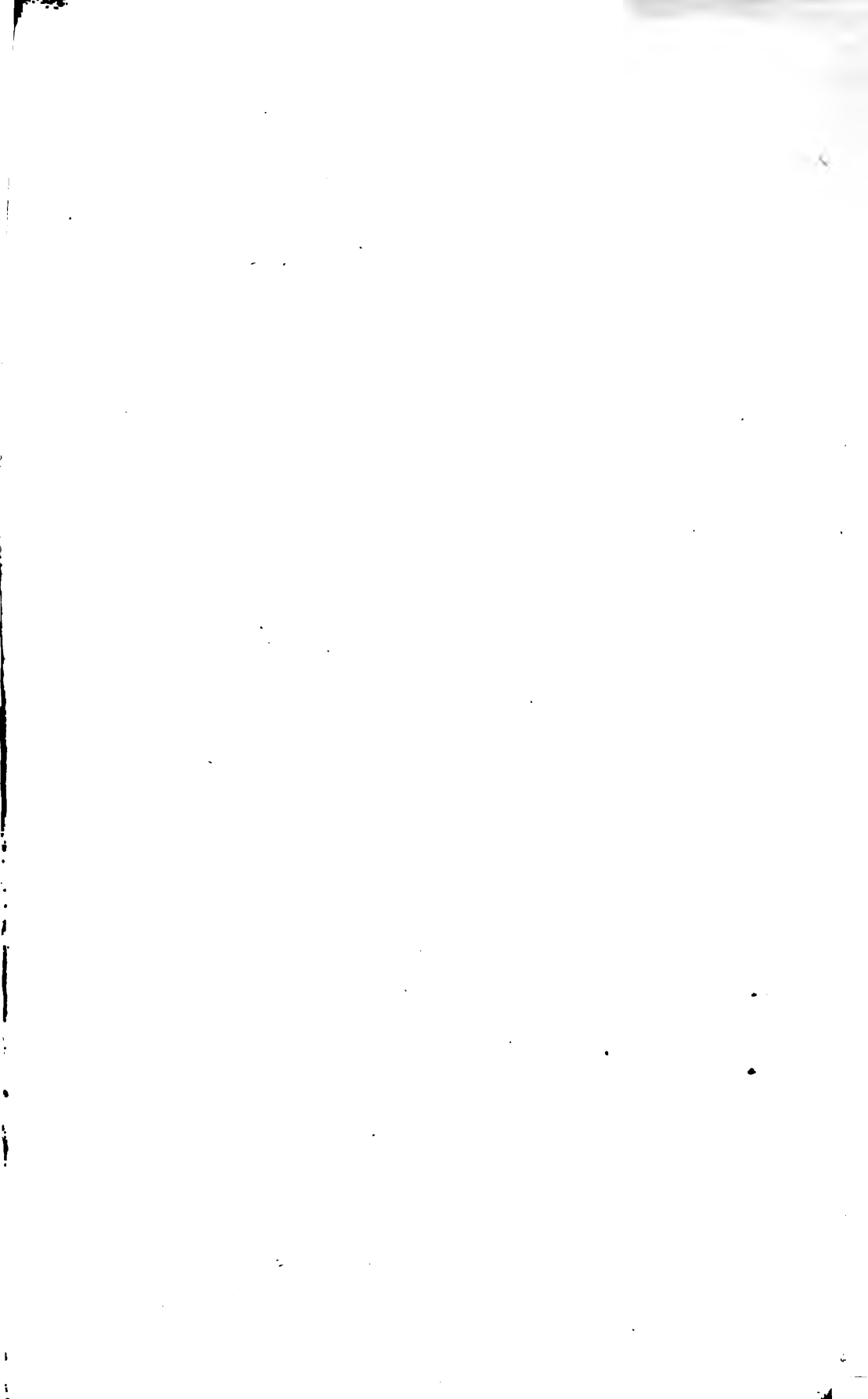
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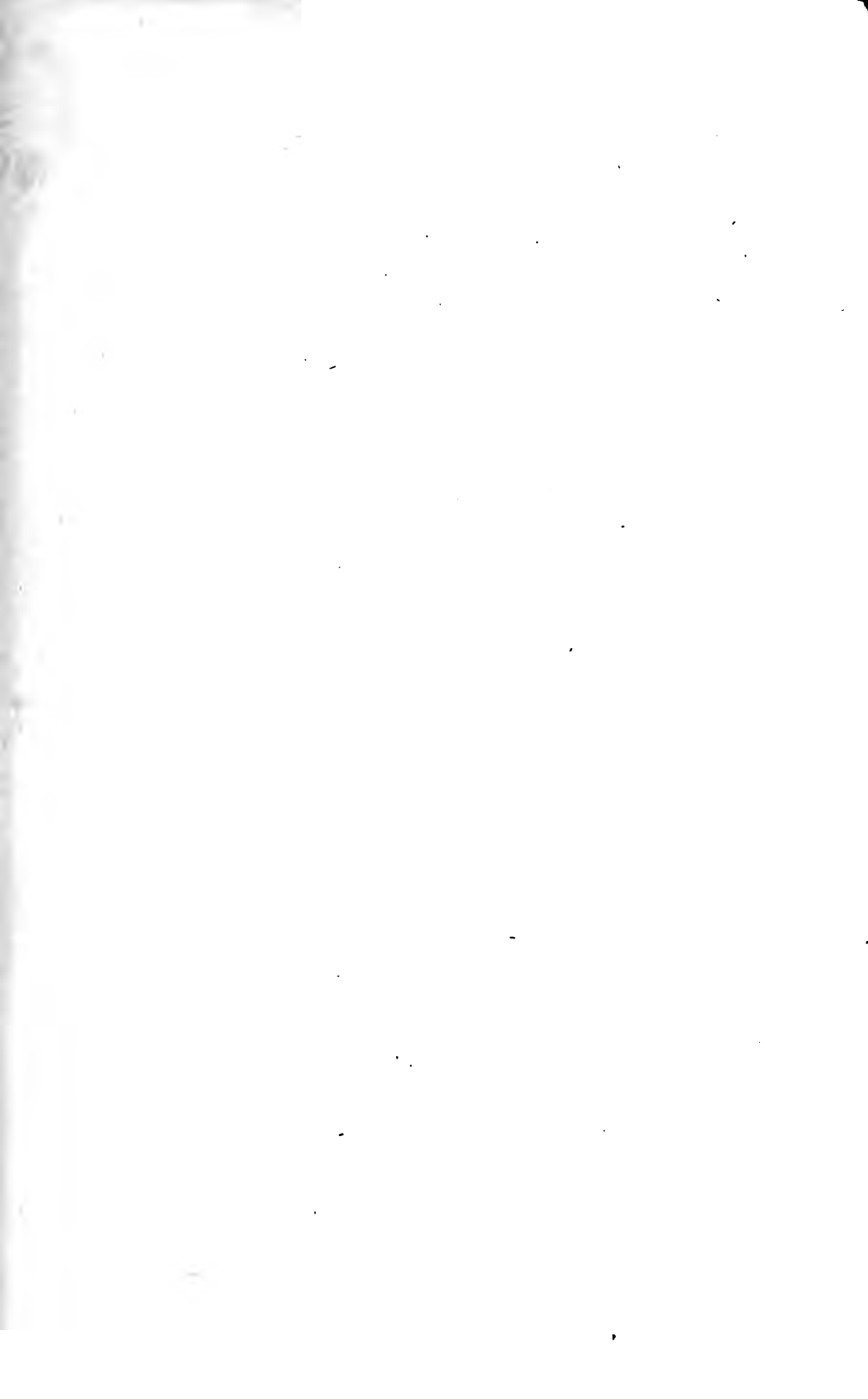
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A PRACTICAL AND ELEMENTARY
ABRIDGMENT OF THE CASES

ARGUED AND DETERMINED

IN THE COURTS OF

KING'S BENCH, COMMON PLEAS, EXCHEQUER, AND AT NISI PRIUS:

AND OF

THE RULES OF COURT.

FROM THE RESTORATION IN 1660. TO MICHAELMAS TERM, 4 GEORGE IV.

WITH IMPORTANT MANUSCRIPT CASES.

**ALPHABETICALLY, CHRONOLOGICALLY, AND SYSTEMATICALLY
ARRANGED AND TRANSLATED;**

WITH COPIOUS NOTES AND REFERENCES TO

**THE YEAR BOOKS, ANALOGOUS ADJUDICATIONS,
TEXT WRITERS, AND STATUTES,**

SPECIFYING WHAT DECISIONS HAVE BEEN

AFFIRMED, RECOGNIZED, QUALIFIED, OR OVERRULED.

COMPRISING, UNDER THE SEVERAL TITLES,

A PRACTICAL TREATISE

ON THE DIFFERENT BRANCHES OF THE

COMMON LAW.

BY CHARLES PETERSDORFF, ESQ.

OF THE INNER TEMPLE.

VOL. V.



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A
PRACTICAL ABRIDGMENT
 OF THE
REPORTS OF CASES
 ARGUED AND DETERMINED
 IN THE COURTS OF
KING'S BENCH, COMMON PLEAS, AND EXCHEQUER.
 FROM THE RESTORATION IN 1660, TO
 MICHAELMAS TERM, 4 GEO. IV.

Cabin. See *post*, tit. *Ship and Shipping*.

Calder Navigation. See *ante* tit. *Aire and Calder Navigation*.

Calendar. See *ante*, tit. *Almanack*, vol. i. p. 489; and see *post*, tit. *Time*.

Calendar Months. See *post*, tit. *Time*.

Calico Printer And see also *post*, tit. *Conviction; Copyright; Lien*.

1. **LACLOUGH v. TOWLE.** H. T. 1799. 3 Esp. 114.

Trover for a quantity of calico. The plaintiff to show his property in the goods, proved that D. P. a calico printer, received them from S. & M., for the purpose of being printed; that it was the usage of that particular trade, when articles were damaged in the printing, that the printer should be bound to take them. The goods in question had been spoiled, and D. P. had sold them to the plaintiff, who had afterwards delivered them to the defendant with a view that he should purchase them. The latter subsequently asserted that he was entitled to retain them for the rightful owner, the party who had sent the articles to D. P. For the plaintiff it was contended, that the usage being established, the mere act of damaging the goods, without leaving any election in the owner, conferred a property in the calico printer.

Per Lord Kenyon, C. J. It is impossible to sustain such a proposition. The goods could not vest in the calico printer by the mere fact of their being damaged, without showing the owners assent that he should keep and sell them; such a practice would open a door to endless frauds.

2. **MAKEPEACE v. JACKSON.** E. T. 1814. C. P. 4 Taunt. 770.

In an action of trover for a colour-book kept by a printer of calico, it was proved, that it is the practice of that trade to retain a standard colour, compounded of certain ingredients, to which standard all colours mixed in that trade have reference; and it is usual to insert in a book, an account of the process and ingredients of each mixture, and to annex thereto a piece of calico dyed after that colour; and that the book is appropriated to the purpose of reference, in order to prepare orders for goods, as every shop retains a colour peculiar to itself. It appeared that the plaintiff had acted as head colour-man in the shop of the defendant, who, on discharging him, retained a book of the above description. It was urged for the defendant, that the possession of the book was essential to his trade, and, besides, that the materials were his property, though some of the mixtures were the invention of the plaintiff.

Per Cur. The book contended for was kept for the purposes of the trade,

CALICO PRINTER.

and though some of the colours were the product of the plaintiff's invention, yet they were mixed in his character of servant to the defendant; we therefore think the defendant is entitled to the book. See 7 Geo. 1 a. 1 c. 7; 9 Geo. 2. c. 4 s. 1.

Calico, Stealing of.

REX v. DIXON AND OTHERS. 1803. 1 R. & R. C. C. 53.

In order to support the capital charge under the 18 Geo. 2. c. 27. for stealing calico placed to be printed, &c. It must be proved that the place from which [3] the calico was stolen was made use of either for printing or dyeing calico.

The statute 18 Geo. 2. c. 27. s. 1. enacts, that any person who shall, by day or night, feloniously steal any linen, fustian, calico, &c. or any other cotton goods or wares whatsoever, laid, placed, or exposed to be printed, whitened, bowked, bleached, or dried, in any whitening or bleaching croft, lands, fields or grounds, or other place made use of by any calico printer, &c. for printing, bleaching, &c. to the value of 10s. shall be guilty of felony without the benefit of clergy.* The prisoners were prosecuted upon this statute. The indictment stated, that they had taken 50 pieces of calico, laid and placed to be printed in a certain building at B., made use of by the prosecutors for printing the same calico. The same count described the building as one for drying; the third as a piece of ground; the fourth generally, that the prisoners did steal, &c. No direct evidence was offered that the place was used for the purpose of printing or dyeing; but after the defendants had been found guilty and sentenced to death, a doubt was suggested, whether there should not have been proof that the building, or ground, was used for printing, &c.; and, on a reference to the twelve judges, they were of opinion, that the conviction on the three first counts, which contained a capital charge, was wrong, as it did not appear that the premises from which the calicoes were abstracted was either a building used for printing or for dyeing; but as the evidence supported the fourth count, which charged merely a simple larceny, the defendants might be punished for that offence only. See *Rex v. Hugill*, cited 4 Bl. Com. by Chitty, 240. n; and *Precedents*, Petersdorff's Index, 16. Crim. Div. and Arch. Crim. Pl. 142. 1st edit.

Calling the Plaintiff. See *post*, tit. *Nonsuit*.

Calves. See *post*, tit. *Tithes*.

Cambridge. See tit. *Comusance, Claim of; Copyright; Corporation; Replevin, Universities*.

Cambridgeshire. See *post*, tit. *Fieri Facias, Process*.

Cambden's Britannia. See *post*, tit. *Histories*.

STAINES v. BURGESSES OF DROITWICH. M. T. 1694. K. B. 1 Salk. 281 S. C. Skin. 623.

This was an issue out of Chancery, to try at bar, whether by the custom of Droitwich; salt-pits could be sunk in any part of the town, or in a certain place only. Upon the trial Cambden's Britannia was offered in evidence, but rejected, the Court being of opinion, that although a general history may be given in evidence to prove a matter relating to the kingdom in general, because the nature of the thing requires it, it could not be relied upon to prove a particular right or custom. See S. P. 1 Phil. Ev. 338. 3d edit; 1 Stark. Ev. 62; 2 id. 180. 181; Peake. Ev. 114; Bul. N. P. 248; 1 Vent. 151; Skin. 14; 1 Barnard. 14. 2 Jones. 164.

Cambden's Britan-
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Canalst. See tit. *Fishery; Joint Stock Companies*.

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II. COMPENSATION TO BE PAID TO PROPRIETORS FOR

* The 51 Geo. 3. c. 41. s. 2. repeals this part of the act, and directs that the offender shall be punishable by transportation for life; or for any term not less than seven years, or by imprisonment and hard labour not exceeding seven years; see 4 Geo. 3. c. 37; s. 16; 4 Geo. 4. c. 56.

† The national benefit ensuing from this species of communication is almost too obvious to require examination or comment; for it is presumed that if a selection were to be

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I. DEFINITION AND UTILITY OF.

Canals are artificial rivers, provided with locks and sluices, and sustained by banks and mounds, and are generally dug for commercial purposes, to expedite the inland navigation of goods from one place to another.

II. COMPENSATION TO BE PAID TO PROPRIETORS FOR CUTTING CANALS THROUGH LANDS,* AND RIGHTS [5] AND DUTIES OF COMMISSIONERS.

1. THE KING V. THE STAINFORTH AND KEADBY CANAL COMPANY. H. T. 1813. K. B. 1 M. & S. 32.

This was an application for a *mandamus* to compel a meeting of the commissioners, appointed pursuant to the provisions of an act of parliament, to proceed to an assessment of the value of land taken by them for the purposes of the Stainforth and Keadby Canal, and also of the recompence to be made for the damages thereby sustained. It appeared, that in 1799, the company took the land in question, of which Lady S. was then tenant for life, and M. H. afterwards became so at her decease, and converted it to the purposes of this navigation. At that period they valued the land, without giving any notice of it to Lady S., or tendering the money at which they estimated it. In 1807

made out of the numerous causes which conspire to increase the wealth, population, and general happiness of a state, canals, or cheap inland navigation, would be chosen as constituting the most prolific source of prosperity. It is through the aid of these conduits that a widely scattered population can obtain and enjoy the same advantages as the inhabitants of large cities; and they are equally advantageous to towns by destroying local monopolies. It is through them that the several towns in Holland, Zealand, and Flanders, have for many centuries maintained an active intercourse with each other; that Paris is so closely connected with Rouen and Havre de Grace; that Switzerland maintains by the Rhine an intercourse with Holland; and that in England, particularly since the multiplication of canals within the last 70 years, the conveyance of coal, iron, salt, and other bulky commodities, is so much facilitated. On the other hand the want of such intercourse is the principal cause of the comparative slow advancement of wealth and population in Spain, Poland, the South of Germany, and in no inconsiderable degree in France. The signal benefits to be derived from the establishment of this mode of intercourse were first pointed out to the notice of this country by Dean Tucker. In his celebrated book on trade (p. 116.) he observes, that the expedient of cutting canals is preferable to making rivers navigable, the expence not being in general greater, the repairs being easier, and the natural casualties of inundation, shifting of sands, &c., less in the case of a canal than a river; and the labour of navigation on a canal being the same both up and down. Canals are usually formed in England by single individuals, or public companies established for that purpose (see *post*, tit Joint Stock Company,) under the sanction of acts of parliament. The rules and principles to be observed in framing these statutes are now well understood. The essential requisites are the establishment of a company as a corporation with a fixed name; power for the projectors to obtain such lands as they may require, on paying a proper compensation; to raise money; to make bye-laws; and generally to do all acts which may benefit the concern, care being taken that a proportionate benefit shall also be secured to the public.

* Some of the canal acts direct the amount of compensation to be paid for cutting through lands to be settled by commissioners appointed for the purpose, who are to ascertain, either by annual rent or a sum in gross, the value of the lands set out for making the canal, as also the recompence for damages sustained; and if the parties are dissatisfied

A *mandamus* can not be obtained to compel a canal company to assess the value of, and amount of compensation due for, land taken for the purpose of the canal, unless the application for the writ be made within a reasonable time.

Lady S. died, and in 1810 the agent of M. H. made several applications for a settlement; and, in that year, calculations far below the real value were formed by the company, and an offer of the money made, since which no proceedings had been adopted. *Per Cur.* This application should have been made earlier; many changes must have occurred in the company's property, which would be seriously affected by our granting this rule. The parties have an adequate remedy by ejectment, to which they must have recourse.—Rule refused.—See the *King v. the Severn and Wye Railway Company*, 2 B. & A. 646. abridged post, Railways; and 2 M. & S. 80; 10 Ves. 92.

2. COMPANY OF PROPRIETORS OF THE LEOMINSTER CANAL NAVIGATION V. NORRIS. H. T. 1798. K. B. 7 T. R. 500

Where commissioners are empowered to determine the sum to be paid for lands to be used for a canal, with authority to the owners of land to distrain for non-payment of the amount the latter may distrain for an annual sum decreed to be paid by the commissioners.

The commissioners under a canal act (31 Geo. 3.) were empowered to determine all questions that should arise between the company and the persons interested in any lands that should be affected or prejudiced by the execution of the act; and also to determine what sums of money should be paid by the company, either by annual rent, or by a sum in gross, for the absolute purchase of the houses, lands, &c., that should be set out, or made use of, for the said canal, and also to determine what other distinct sums of money should be paid by the company as a recompence for any damages which should be sustained by such persons interested, &c. in the said lands; that the annual rents so agreed upon or settled, should be charged on the rates therein granted to the company, and should be paid by them as the same should become due; and in case such annual rents or sums should not be paid within 21 days after they should become due, such persons were thereby empowered to seize or distrain any effects of the company, which should be found on the canal, or on the wharfs, warehouses, &c. thereto belonging, and to detain the same until payment, &c. In replevin to try the legality of a distress made under the act of parliament, it was objected that the distress could not be supported as a distress at common law, because the goods were distrained off the premises, nor as a distress under the act, because the statute only gave a power to distrain for an annual rent of sum of money in gross "*for the absolute purchase of the lands,*" &c.; whereas it appeared from the avowries, that this was not an annual rent, or a sum for the absolute purchase, but merely an annual sum until

with their determination, the commissioners are to issue a warrant to the sheriff of the county where the lands lie to summon a jury to assess such value or recompence. According to most of these acts, on payment or tender of such sum as the commissioners ascertain or the jury assess, the company may take possession of the lands; and upon further recording the determination of the commissioners, or the verdict of the jury at the sessions, the land will vest in the company; but until such sum is paid or tendered, the company will not have power to enter; see the *Stainforth and Keadby Canal Act*, 35 Geo. 3, c. 117; 1 M. & S. 32, n.

If the funds represented to parliament as adequate for the completion of the undertaking be sufficient, the persons authorised to cut the canal will be directed by a court of equity, on the previous application of the owner of the lands through which they are cut, to desist from further proceeding; *Agar v. the Regents's Canal Company*, cited 1 Swanst. 250. n; Cooper. C. C. 77. 193. But persons so authorised to cut a canal and required to appropriate certain sums for the construction and maintenance of works to protect a harbour in which the canal was intended to terminate, cannot be restrained from cutting through their own lands at a distance from the harbour, in the event of a present insufficiency of funds for the completion of the undertaking, pending an application to parliament for further powers to levy money; *Mayor, &c. of King's Lynn v. Pemberton*, 1 Swanst. 244. And though the Court will not in general restrain an action of trespass by a party through whose estate a canal is being cut for deviating from the line, because he has laid by and rested upon his legal right; yet if he files a bill to restrain their deviating, and then moves to commit them, the Court will not in a disputed case do so, without a trial by a jury, and directing an issue at law; *Agar v. Regent's Canal Company*, Cooper, 77.

The commissioners for making a brook navigable, with powers to borrow money, having given orders for persons to be employed in the works, all the acting commissioners who were present at the meeting were holden liable to pay the workmen, although the fund was deficient; *Horsby v. Bell*, Amb. 769. 772; for, as observed by the Court, the workmen, who engaged to do the work, could not know the state of the fund, nor was it their business to inquire; they gave credit to the commissioners; the plaintiff could not be considered as giving credit to the success of the undertaking.

the company should purchase the lands. But the Court were clearly of opinion, that the act conferred a power of distress in a case like the present, and discharged a rule to enter judgment for the plaintiffs.

3. *REX V. GLAMORGANSHIRE CANAL COMPANY.* H. T. 1810, K. B. 12 East. 156.

By the act for making and maintaining the Glamorganshire canal, power was given to the canal company to make all such works as they should think necessary and proper for "effecting, completing, maintaining, improving, and using the canal and other works;" and the company were required to lay before the sessions an account of the sums expended in making and completing the canal, up to the time of its completion; and, after that, an annual account of the rates collected, and of the charges and expences of supporting, maintaining, and using the navigation and its works; and the sessions were authorised, in case it appeared to them that the clear profits exceeded the per centage limited by the act on the sums mentioned in the first account to have been expended by the company, (that is, in making and completing the canal and its works,) to reduce the canal rates. After the period fixed for the completion of the canal, and after the first dividends were to be calculated, the sessions rejected charges and expences stated in the annual account of disbursements for a reservoir and steam engine, which the company deemed necessary, and proved by evidence to have been erected for the support and improvement of the original line of canal, and for the better supplying it with water in dry seasons. And the question which now arose was, whether the company were strictly confined to the repair and sustentation of the original works constructed with the original capital. The Court held that the sessions had acted erroneously, observing; there is no doubt upon this act of parliament that the company may erect new works in furtherance of the purposes of the old navigation. But the judgment of the sessions, in disallowing these charges, has proceeded on the consideration that the company should not execute any new works for those purposes. If we, however, do not view the act in this way, we must read it as if the sessions were appointed the judges of the propriety or fitness of the particular works, admitting such works to have been erected for the purpose of maintaining and using the canal. That was never meant to be the meaning of the act. They were merely to judge whether the charges and expences stated in that account are charges and expences attending the maintaining and using of the navigation authorised by the act, or wholly irrelevant to it. Had the new works been shown to be merely colourable, and erected for purposes collateral to the navigation, authorised by the act of parliament, such charges would have been rightly rejected by the sessions. As matters stand, we must quash the order. See 3 T. R. 286.

4. *HOLLIS V. GOLDFINCH.* H. T. 1823, K. B. 1 B. & C. 205; S. C. 2 D. & R. 316.

Declaration. Trespass for breaking and entering the close of the plaintiff in the parish of Compton, in the county of Southampton, bounded on the east by a ditch, and on the west by the river Itchen, and cutting down the trees and bushes of the plaintiff, and materials thereof, coming, taking, carrying away, &c. Plea, general issue. At the trial, it appeared that the *locus in quo* was the bank on the opposite side to the towing path of that part of the river Itchen, called the New Cut, which apparently had been formed with the earth taken from the channel of the navigation, and thrown on the land of the defendant, called Warner's Mead, between which and this bank was a small drain, called the Counter Ditch. The plaintiff put in evidence an act of parliament, made in the 16 & 17 Car. 2. whereby it was enacted, that Sir Humphrey Bennett and others might make the river Itchen navigable; that they might make, in the adjoining lands, locks, sluices, towing-paths, &c.; that, in order that what they might do should not be prejudicial to any persons, it was provided that the undertakers should not dig, cut, carry, or make any trench, river, watercourse, or use the locks, wears, pens of water, cranes, and wharfs, the passages, ways, bridges, or footpaths, in or upon the lands of any person,

And where a canal company were authorised to make all such works as they might deem necessary for "effecting, completing, maintaining, improving, and using the canal and other works," they were entitled to construct new works in bona fide furtherance of the purposes of the old line of navigation.

But where an act for making a river navigable, provided that no bank, cut, towing path, &c. was to be used until a full agreement and satisfaction was made to the land owners, held 1st, that the proprietors of the navigation did not

[8] until a full agreement with, and satisfaction to, the respective owners and occupiers of the lands were had or made by any five of the commissioners appointed by the act, or by the persons authorised to make the navigation, nor until such recompence or satisfaction shall have been given or paid to the respective owners of such lands, according to the determination of the commissioners, or agreement made by the persons authorised as aforesaid, unless it were by the consent of the respective owners, or, where they should refuse to appear before, or submit to, the determinations and decrees of the commissioners; in which latter case, the persons authorised by the act, their servants, or workmen, by the order and approbation of the commissioners, were empowered to cut, dig, or make, any new river, &c., and to make, maintain, and use the said locks, wears, sluices, &c. made or built upon the lands of the persons so refusing, in as full a manner as if the agreement had been made with the owners by the persons so authorised, or as if the owners had submitted to the determination of the commissioners. The justices of the peace of the respective counties were made commissioners. It was further enacted, that the commissioners should hear and determine all controversies, and that their determination should be binding on all persons, and that their orders, sentences, &c. should be set in writing under the hands and seals of the commissioners, or any five of them and kept among the records of the sessions; and that transcripts should be delivered to the clerks of the peace, to be by them kept upon record amongst the records of their sessions of the said counties; and that they should be taken, construed, deemed, and adjudged good and sufficient evidence in any court of record whatever. The plaintiff having first proved that no transcript of any order, &c. of the commissioners should be found in the office of the clerk of the peace for the county of Southampton, offered a piece of paper in evidence, which he proved to be found among his title deeds, appearing on the face of it to be an award of the commissioners; but the learned judge refused to accept it, because it did not come from the clerk of the peace. The plaintiff then proved several acts of ownership many years back upon the place in question, by cutting the bushes, and digging the soil, and making a towing-path. He also proved acts of ownership upon other parts of the bank on the side of the New Cut, but beyond Warner's Meadow, which evidence the learned judge received, on the ground that the plaintiff, claiming a general right over the bank of the navigation, the acts done in one part were evidence to explain what was the right over other parts. The plaintiff then put in a lease of 8th September, 1750, by which Edward Pyott, the former proprietor of the navigation, let for 21 years, to R. Goldfinch and others, such a quantity of water flowing in the river Itchen, that lay above a meadow, called Crompton Mawn, which adjoined Warner's Mead, so as not to impede the navigation, together with four hatches or sluices, for the purpose of watering or irrigating the pasture land. The defendant proved that the bushes growing on the bank had been cut by his order, and that about 10 years ago there were eight or nine large ash poles growing on this bank, which were then cut down, and taken away by his order. The judge told the

[9] jury that they might, from the great length of time which had elapsed since the cut was made, presume that some agreement had been made between the parties, and that satisfaction had been received by the landowner for giving up his land for the purposes of navigation, if they thought the usage was in favour of the plaintiff, and that the question was one of a simple fact. By whom had the acts of ownership been made? The jury found their verdict for the plaintiff. A rule for a new trial was obtained on two grounds; 1st, That the learned judge had directed the jury to find that the soil of the bank in question vested in the proprietors by agreement, when the act of parliament merely gave an easement; 2d, That the learned judge had received proofs of acts of ownership said to have been exercised upon other parts of the bank, which was not one entire property. Cause was shown against the rule, and it was contended, that acts of parliament made in the time of Charles the Second, must not be expounded by the same rules as modern statutes, and that the

iously established that the places to which those acts were applied were part of one entire district.

legislature intended for the soil to pass. But counsel relied upon the presumption that no agreement had been made and the acts of ownership exercised by the plaintiff. *Per Cur.* We are of opinion that the statute 16 & 17 Car. 2. did not give any right to the undertakers of the canal to purchase the soil. They merely wanted the use of the land through which the river passed; and there was no necessity for them to make any agreement or satisfaction, except for the use of it. In fact, no other right was given to the undertakers, than a mere easement or power to cut and make the canal and towing-path, and do such other things as were necessary for the purposes of the navigation. And as there was not any necessity to put themselves to the expense of buying the land, it would be too much to infer it. To construe this act, let us look to others that are in *pari materia*, and we find that the statute 23 Hen. 8. c. 5. respecting the commissioners of sewers, contains similar language, and gives them an authority to repair the banks of rivers; yet it is clear that they have no property in the soil of the bank; and the same conclusion may be drawn from the *Duke of Newcastle v. Clarke*, (2 Moore. Rep. 666.) It was suggested that although the proprietors did not buy the adjoining land, yet, by digging the earth out of the channel of the river, and putting it on the bank, they acquired a right to whatever might grow on that bank. It would certainly give the bank for all the purposes of navigation, and they would be excused from the effects of committing a trespass on the adjoining land, in consequence of the satisfaction they were bound to make; but they would have no legal right to the soil of the bank, so as to grow any thing they pleased on it. The lease which was produced in evidence at the trial, had for its object, to grant so much water as would irrigate the adjoining lands of the lessee, and therefore, it demises the four hatches or sluices then standing on the bank of the river. It cannot be said that the lease imports, that if the hatches belong to the lessor, that therefore the banks do. For it was necessary to make these hatches for the purposes of the navigation, by which means a right is acquired over them; and there is an express proviso that the lessees should keep the hatches in repair, and should stop down or keep open the hatches for the purpose of maintaining the navigation of the river, and preserving a sufficient quantity of water in the navigable canal, in such manner as to the lessor should seem proper to effect that object. With respect to the admissibility of the evidence of acts of ownership in other and different parts of the bank, we are clearly of opinion that it ought not to be received; for the cases of that description all proceed upon the ground of unity of ownership, or similarity of character between the place in question and the other parts of the bank. In the present case, there was no such unity of ownership established in evidence; and it is easy to imagine that this channel ran through the lands of several persons. Some might be willing to sell, and others unwilling to part with their lands; and it cannot be inferred, that because 19 persons in one particular line of bank grant away their freehold up to the edge of the water, that therefore the 20th person has done the same thing. There might be as great a diversity of right over the different parts of the bank, as the number of persons through whose lands the channel is made; which clearly shows that the evidence should be confined to the spot in question. On the whole, therefore, we are of opinion, that as there are not any words of sale in the act, and it was not necessary to purchase the land for the navigation, that the act of parliament was not properly presented to the jury for their consideration. We think also, that the lease can produce little weight on the mind, and that the evidence respecting the ownership on any other bank ought not to have been admitted.—Rule absolute. See 2 Ves. jun. 652; 14 East. 332; 2 B. & A. 554; *Callis on Sewers*, 74

5. THE COMPANY OF PROPRIETORS OF THE WYRLEY AND ESSINGTON CANAL NAVIGATION V. BRADLEY AND OTHERS. E. T. 1806. K. B. 7 East. 368.

A canal act provided that the canal company should not be entitled, on purchasing lands for making a canal, to any coal mines, &c. under the same, but that such mines should belong to the same persons as would have been entitled

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So if a canal company who

might have stopped the working of mines contiguous to the canal, by the special provisions of an act of parliament, refrain from doing so, they cannot afterwards complain of their canal being undetermined. [11]

to them if the act had not been made; but it required the owners to give notice to the company of their intention to work their mines within 10 yards of the canal, and that the company might inspect the mines and stop the further working of them, on paying compensation to the owner. It appeared that notice was given to the company by the defendant, before he began to work his mine within the given distance of the canal, of his intention so to do, who declined purchasing out the defendant's rights; in consequence of which the defendant continued working on the mine in the usual way, till damage happened by the partial giving way of the sides and bottom of the canal. Plaintiff's were nonsuited. A motion was now made to set aside the nonsuit, on the ground that the defendant was bound so to use his own so as not to injure the plaintiff's property. A case was mentioned, which had been tried before the same judge as this cause, between the Birmingham canal company and others, where the company had, under similar circumstances, obtained a verdict. But the judge observed, that although he had no distinct recollection of that case, unless the words of the act were very different, he could not now adhere to his former opinion.* And the court said, the legislature left to the owners of the lands the entire dominion and benefit of their property in every respect, not otherwise expressly provided for; the defendant having done every thing which he was required to do by the act, it was the company's own fault, if, upon the notice received, they did not choose to purchase out the defendant's rights, and the rule must be refused.—Rule refused.

An original subscriber to a canal navigation is not liable for any call made by the committee after he has as signed his share.

III. SHARES IN CANALS, AND CALLS UPON SUBSCRIBERS.

1. **HUDDERSFIELD CANAL COMPANY v BUCKLEY.** M. T. 1796. K. B 7 T.R. 36. Action on the case *in tort*. The declaration stated that the defendant had subscribed to advance several sums of 500*l.* 100*l.* and 200*l.* towards making and maintaining a canal; and, in respect of such subscription, had become one of the proprietors of, and entitled to eight shares in the undertaking; that afterwards the committee duly chosen, &c. made a call of 10. *per cent.* on the proprietors. The declaration then stated the proportion due from the defendant and its non-payment.

A verdict was given for the plaintiffs, damages 146*l.* subject to the opinion of the Court on the following case—On the 30th of May, 1793, the defendant and many other persons subscribed an instrument duly stamped, not under seal, by which they agreed to subscribe the respective sums set opposite to their names, towards the expences of soliciting the act in question, and of making and maintaining the canal, &c., and agreed to pay such sums to the treasurer when called upon for that purpose, &c. The defendant subscribed for five shares and two shares, and afterwards subscribed for another share. By the stat. 34 Geo. 3. c. 53. the subscribers were incorporated by the name of Huddersfield Canal Company, and were empowered to make the calls stated in the declaration, which were regularly made as stated in the declaration. The first proportion of the first call being 2*l.* *per cent.* was paid by the defendant on all the eight shares so subscribed for by him; and the remainder of that call being 8*l.* *per cent.* on his remaining five shares, amounting to 40*l.* was paid into court by defendant; and the calls on the three other shares were paid by R. Gray, the purchaser of them. On the 6th of August, 1794, the defendant sold five of his eight shares to J. Kelsall, at a profit of 17*l.* *per cent.* on each share, and transferred his interest therein to Kelsall, by a proper transfer registered by the company's clerk. On the 4th December, 1794, the following entries were made in the plaintiffs' books by their agents. "J. Buckley, first subscription, 500*l.*; second ditto, 100*l.*; subscription as a land-owner, 100*l.* subscription as a mill-owner, 100*l.*—1794, July 9; by transfer to R. Gray, 300*l.*; August 6, ditto to J. Kelsall, 500*l.*" By a corresponding entry also in the books, under the name of J. Kelsall, the transfer of 500*l.* to him from Buckley, was stated. The questions for the opinion of the Court

* The words of the Birmingham act, 28 Geo. 3. c. 92. s. 99. are materially different from the statute upon which the above case of the Wyrting and Essington Canal Company was decided.

were, 1st, Whether the plaintiffs can recover in this action the amount of the subscriptions demanded by the declaration; 2dly, Whether the defendant be liable to pay interest on the call paid into court from the time it was ordered by the committee to be paid to the treasurer, and on the calls mentioned in the three last counts from the respective days when those calls were required to be paid, until payment thereof.—By sect. 1 of this act of parliament, certain persons by name, among whom are the defendant and T. Kelsall, and their respective successors, executors, administrators, and assigns, are incorporated. By sect. 74. it is directed, that “if any person shall neglect to pay his proportionable share of the money to be called for by the first call, &c. it shall be lawful for the company to sue for, and recover the same in any of his majesty’s courts of record, by action of debt, or on the case; and if any person shall neglect to pay his proportionable share of the money, to be called for after the first call, he shall forfeit 5*l.* for every share; and if he shall neglect to pay, &c. for the space of three months after the time appointed, &c. he shall forfeit his share for the benefit of the other proprietors, &c.” By s. 79. the proprietors may sell shares; and duplicates of the assignments of shares are to be delivered to the committee, and an entry thereof made in the company’s books; and after such assignment, the purchasers are to have shares in the profits, and to be entitled to vote as proprietors. But by s. 80, no share is to be sold after the call of any money, until such money is paid. By s. 119. subscribers are required to pay the sums by them respectively subscribed, or such proportions thereof as shall from time to time be called for by the committee, &c. “and in case any person shall neglect to pay the same at the time required, it shall be lawful for the company to sue for and recover the same in any court of law and equity.” There were three objections made on behalf of the defendant; 1st; That the action could not be maintained in its present form; 2dly, That no interest was payable on the calls made by the committee after non-payment of such calls; 3dly, That the assignment to a purchaser discharges the original subscriber from all future responsibility.

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Per Cur. We are of opinion with the plaintiffs upon the two first points, and with the defendant on the last, we think that the action is maintainable in this form, the act having said, in express terms, that the company may sue by an action on the case; and the plaintiffs having stated in their declaration every thing that the act of parliament requires. Nor is there any doubt but that the jury may give interest, not *eo nomine* as interest, but as damages for the detention of the debt, for non-performance of the contract. But the last point is equally clear against the plaintiffs. On looking through the act of parliament, it is evident that the legislature meant, that the parties should only be liable to the payment of their shares so long as they individually continue members of this company, that is, so long as they have property which constitutes them such. The persons, who have the right of voting, are to vote in respect of their shares. The act also says, that persons who have subscribed, and their assigns, shall be deemed proprietors; but it would be ridiculous to determine that a person, after he has sold his shares, in respect of possessing which only he became a proprietor, should still continue to be a proprietor. After assignment, the assignees hold the shares on the same conditions, and are subject to the same rules and orders; as the original subscribers, and are to all intents and purposes substituted in the places of the original subscribers. One reason, however, now urged why the original subscribers should always continue responsible, is, because, perhaps, the shares may be assigned to insolvent persons; but the legislature, when they gave their sanction to this undertaking, did not suppose that it was a mere South Sea scheme; they thought it a beneficial undertaking for the public, and conceived they had introduced a sufficient check by enacting that, if the subscribers did not pay their money from time to time as they should be required by the committee, they should forfeit their respective shares; and that no subscriber should part with his share while he was in arrear to the company. No mischief, therefore, is likely to ensue either to the company, or the public, from this construction of the act. We

Where a statute empowers a company to sue for calls, &c. by action of debt, or on the case. an action on the case in *tert* lies; and in such action interest for the non-payment of the calls may be recovered.

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think, that every clause in this act of parliament leads to the conclusion; that the persons liable to the calls are those only who continue to be at the time when the calls are made members of this corporation.

2. KIDWELLY CANAL COMPANY V. RABY. H. T. 1816. Ex. 2 Price. 93.

One of several persons who have subscribed an agreement, *inter se*, to promote a joint undertaking for a projected canal, can not withdraw his name and discharge himself from the engagement without the consent of the rest.

This was an action for calls on shares possessed by the defendant. It appeared that the defendant had been one of the original subscribers, and had signed the following paper. "22d August, 1811. A list of subscribers to a fund for carrying into execution a plan for the improvement of the harbour of K. and making proper communications therewith, from the several collieries in the neighbourhood, by a canal or rail-roads;" that an act of parliament was obtained in June, 1812; that the defendant had attended some of the meetings of the committee, and had voted and taken an active part in them; but had on one occasion expressed a wish to withdraw his name from the subscription, and his name was not therefore inserted in the act; that he had, nevertheless, in November following, attended a meeting of the subscribers, and seconded a motion for the appointment of a clerk; and subsequently assigned his shares, though irregularly, to another subscriber. On this evidence, Wood, B. held that the defendant was not at liberty to withdraw his name without the consent of the other subscribers, and the plaintiff had a verdict; and on a motion to set it aside, the Court held, as to the defendant's withdrawing from the speculation, that he could not discharge himself by any declaration to that effect, and that the committee was incompetent to consent to such resignations, and observed, that it could not be said to have been the intention of the legislature to have discharged the defendant, for that would have required an express clause excluding him by name. The words of the act are, "those who have subscribed, or shall hereafter subscribe," therefore the act includes all who had subscribed, and he has done no act to discharge himself from the effects of his subscription. And being within the terms of the act, he would have been entitled to a share of the profits of the undertaking, as a proprietor; he must also be considered liable as such to losses. Wherever there is an agreement between several, one party cannot withdraw without the consent of the others, as in the case of creditors having agreed to take a composition, one cannot retract without the consent of all the rest; here it is admitted that there was no consent, and his declaration of abandoning amounts to nothing.—Rule discharged.

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3. WEAULD OF KENT CANAL COMPANY V. ROBINSON. M. T. 1814. C. P. 5 Taunt. 801.

But the administrator of a deceased subscriber to a canal cannot be made liable personally for calls, either as a subscriber or proprietor of shares, unless a new contract be made to that effect.

The declaration, after reciting that after the passing of a certain act for making a canal from, &c. to, &c., the plaintiffs had, by virtue of the powers thereof, raised and contributed among themselves a competent sum for the purposes, &c. which sum was divided into shares; stated that the defendant afterwards was, and from thence hitherto had been, and still was a subscriber to the undertaking, and the proprietor of divers shares, to wit; &c., and that the general committee of management of the company, made a call for money from the several subscribers to, and proprietors of, etc., and appointed a place of payment, etc. and gave notice in newspapers, etc. and by letter from the company's clerk, addressed and delivered to the defendant, so being such proprietor, etc., whereby an action, etc." It appeared that one A. B. had subscribed his name to a petition presented to parliament for the purpose of obtaining the act in question, and became proprietor of certain shares in the undertaking, but died before the passing of the act; whereon the defendant took out letters of administration to his effects; and being desirous of taking the above shares, paid the calls made by the company, and by letter requested to have a receipt in his own name, as he had paid the money on his own account. The clerk, however, sent a receipt in the name of A. B. which the defendant kept. The present action was brought for the calls due on the shares, and the jury found for the plaintiffs. A rule nisi was then obtained to enter a nonsuit, on the ground that the defendant was improperly charged as personally liable to the plaintiffs' demand. It was urged for the plaintiffs that the defendant's letter

requiring a receipt in his own name, was conclusive of his liability for the calls of the company. The Court were however of opinion that the defendant was clearly incorrectly described; for though he had paid the money with a view of taking the shares, and had requested to have a receipt in his own name, the latter circumstance would not avail the plaintiffs, as they had not complied with his requisition. —Rule absolute.

4. LATHAM v. BARBER. M. T. 1794. K. B. 6 T. R. 67.

The 33 Geo. 3. c. 94. a navigation act, after directing a certain sum to be raised, and that it should be divided in equal shares, enacted, that "the said proprietors should, and might at the first general assembly to be held after all shares, and or any of the proprietors should have paid 10l. *per cent.* of his, her, or their subscription, execute under the common seal of the company, one separate and distinct deed for each of the shares, and deliver the same to such proprietor or proprietors having made such payment of 10l. *per cent.* which said deeds respectively should vest in such proprietor or proprietors, his or their executors, administrators and assigns, one 750th share of the property of the said company, etc., which said several before-mentioned deeds and shares therein granted, and all right and interest to the same, might be transferred by the respective proprietor or proprietors to whom the said should be given, his or their executors, administrators, etc., to any person by indorsement thereon in writing, etc." The plaintiff having declared in *assumpsit* against the defendant for not completing a contract for the purchase of some of the shares, and the declaration having averred that "the plaintiff was lawfully entitled to" the respective shares, to wit. on the 25th of May, 1793; it was objected that the allegation could not be sustained, inasmuch as no share actually vested in the proprietors before the first of July, 1793, which was the day on which the first meeting was holden, and that therefore the averment that on the 25th of May the plaintiff was lawfully possessed of the shares, was not proved, because by the express terms of the act, no proprietor was lawfully possessed until after the first meeting. The plaintiff was nonsuited; and on motion to set it aside, the Court said: As no distinct shares could be vested in any individual until the first general meeting, when, according to the act, the company were to execute separate and distinct deeds for each of the shares, which said deeds respectively should vest in each proprietor his share, etc. the objection to the averment that he was lawfully possessed on a day prior to the first general meeting must prevail.

IV. TOLLS PAYABLE ON CANALS, AND EXEMPTIONS FROM THE PAYMENT OF.

1. LEES v. THE COMPANY OF PROPRIETORS OF THE CANAL NAVIGATION FROM MANCHESTER TO ASHTON-UNDER-LINE AND OLDHAM. M. T. 1809. K. B. 11 East. 645.

By statute (see 32 Geo. 3. c. 84. s; 64; 33 Geo. 3. c. 21. s. 11; 38 Geo. 3; 40 Geo. 3; and 45 Geo. 3.) a canal company were empowered to take such rates as should be fixed at a general assembly of the proprietors, not exceeding one penny, etc. per ton per mile upon coal; and they were also empowered to reduce the rates at a general assembly, held on certain notice; but no reduction was to be made without the consent of the major part in value of the proprietors, which tolls were to be a security for the money subscribed. The plaintiff contracted with the company, to make a given cut through land not within the statutable line of canal, to communicate with the company's canal for the better supplying it with water, and to do certain other works, and to send by the canal, and by no other conveyance, all the coals he should raise from certain collieries, of which he was the owner, or so much as could be disposed of at M., or at or near the line of the canal; and the company covenanted, that the plaintiff should be permitted to carry his coals along the whole or any part of the canal, on payment of one half-penny per ton; and that the company would pay back to him a farthing per ton. The plaintiff instituted this action for the not allowing him to carry at one halfpenny per ton, and not pay-

regulating a canal directed a sum to be raised by shares, and that at the first general meeting distinct deeds were to be executed for each share, and delivered to the respective proprietors, in an action by a proprietor for the price of a share, an allegation that he was lawfully entitled to a share at a day previous to the meeting, was holden vicious, inasmuch as no distinct share vested in a proprietor previous to the first general meeting.

A contract by a canal company (incorporated by statute,) to reduce the toll, other wise payable by an individual in consideration of his carrying all his coal to the canal along a cut made at the expense of each party

entering the said canal, after passing through,

[16]
land not within the statutable line of canal, was held illegal, it appearing that the rates could only be altered with consent of the majority in value of the share holders, which tolls were made a security for the money subscribed.

Where one canal company have agreed to regulate the amount of their tolls by the rates fixed upon by another canal company, the former are bound to adhere to the rates agreed upon by the latter at a general assembly, and under their common seal, although perhaps the

[17]
validity of such decrees might have been collaterally questioned.

ing back the farthing per ton. The defendants pleaded, that they were empowered to reduce the rates at a general assembly, &c., but that no reduction was to be made without the consent of the major part of the proprietors; that the rates were reduced by the above indenture, and that such reduction was not made at any general assembly, or with the consent of the requisite number of proprietors, or so as to relate to other persons using the canal. General demurrer. The Court held such contract illegal and void, as a speculation by which the company might gain more or less than the legislature intended they should take under similar circumstances from the public in general, inasmuch as the bargain might be highly advantageous to the company if the expence of what they were to do was large, and if from the state, &c. of the party's collieries, the quantity of coal he should be able to send should be so much; but, upon the reverse of these positions, it would be advantageous to the plaintiff, and might be prejudicial to the company, as extending, in effect, the power of the company to purchase land beyond the limits assigned by the act; as enabling them to raise more capital than they were entitled by the act to do, by means of paying for land or works, by a total or partial sale of their tolls, which tolls are made a security for the money subscribed or taken up on mortgage, and observed—upon these grounds judgment must be given for defendants; and it may be at the same time recollected, that our decision seems equally proper when the rights of the public are considered, they having an interest that the canal should be kept up; and whatever has a tendency to bring it into hazard is an encroachment upon their right; and they, besides, having an interest that the tolls should be equal upon *all*; for if *any* are favoured, the inducement to the company to reduce the tolls *generally* below the statute rate is diminished. — Verdict for the defendant.

2. THE COMPANY OF PROPRIETORS OF THE MONMOUTHSHIRE CANAL NAVIGATION V. KENDALL AND OTHERS. E. T. 1821. K. B. 4 B. & A. 453.

The 32 Geo. 3. c. 102. provided that the Monmouthshire Canal Company should not take any higher or greater rate of tonnage than should for the time being be taken by the Brecknock Canal Company, which canal company by the 33 Geo. 3. was bound to fix the tolls at a general assembly of proprietors. It was, however, also provided by the 33 Geo. 3. that no alteration should be made in the rates or tolls without the consent of so many of the said proprietors as should be possessed of at least two-thirds of the whole number of shares in the said undertaking; it also provided, that the proprietors might vote by proxy. It appeared in this case, that a general assembly of the said company had been held for the purpose of reducing the several tonnages on the said canal, in compliance with a notice which, in accordance with the requisitions of the act, had been brought home to the knowledge of the proprietors; that a great number of proxies had been produced, in the form prescribed by the act, but without any stamp; and that two-thirds of the proprietors, personally present and by proxy, resolved that the tolls should be reduced, and affixed the seal of the said company to their resolution. Had, of course, the Monmouthshire Canal Company deemed the decision of the Brecknock Canal Company valid in all respects, and corresponding with the enactments of the statute incorporating and regulating the latter, they would have acquiesced in their decision, and have proportionably lowered their rates of toll; but in this action they refused to follow the example of the Brecknock Canal Company in the reduction of their rates, and accordingly sued the defendants for what had been, prior to the passing of this decree, the existing amount of toll, on the following ground—viz. that when it was said that they were precluded from taking any higher toll than that taken by the Brecknock Company, it meant that the toll legally taken by them, and not the toll actually taken; that, according to the act of parliament relating to the Brecknock Canal Company, it must be shown that the alteration had been consented to by two-thirds of the proprietors; that a proxy was not admissible without a stamp; and that, consequently, if the proxies were not admissible, such consent was not given, and the reduction was null and void. *Sed per Cur.* If it were necessary to de-

termine whether a proxy required a stamp, we should take time to consider of that question; but it is not necessary to decide that point. It seems to us, that the resolution of the Brecknock Canal Company reducing their tolls, being under their common seal, the Court are not called upon to decide as to the validity of that resolution. If the Brecknock Canal Company acquiesced in the resolution for the reduction of the tolls, it is not competent to the plaintiffs to show that such resolution was irregularly passed.—Judgment for the defendant.

3. COMPANY OF PROPRIETORS OF THE LEEDS AND LIVERPOOL CANAL V. HUSTLER. H. T. 1823. K. B. 1 B. & C. 424; S. C. 2 D. & R. 557. reversing the decision of HOLLINSHEAD V. THE COMPANY OF PROPRIETORS OF THE LEEDS AND LIVERPOOL CANAL. M. T. 1818. K. B. 2 B. & A. 86.

The 23 Geo. 3. c. 47. declared that no boat navigating upon a certain canal which should not be capable of carrying a greater burthen than 20 tons, or which should not have a loading of 20 tons, should be allowed to pass through any of the locks, unless the owner or navigator of such boat should pay tonnage equal to a boat of 20 tons. The question which now arose was, whether empty boats were included within the above provision.

Per Cur. Our decision will be obvious from a reference to a clause in a former statute, 10 Geo. 4. c. 114. relative to this canal. It enacts, that no boat of less burthen than 20 tons should pass any of the locks without paying tonnage equal to a boat of 20 tons; but it did not impose any toll upon empty boats. It was merely intended to put smaller boats upon the same footing as those of 20 tons burthen; and, before that time, the latter, if empty, were not liable to toll. It was afterwards found, that boats of greater burthen than 20 tons sometimes navigated with less than that quantity of cargo, by which the company were deprived of part of the benefit which the legislature intended to confer by passing the former act; and, therefore, the 23 Geo. 4. imposed upon boats capable of carrying 20 tons, and not having 20 tons on board, the same toll as was payable by boats having 20 tons on board. We think that cannot mean an empty boat; but that, in order to bring the case within that clause, the boat must have some loading on board. The act does not affect to create a new toll, but only to increase those already existing; but if it is to comprehend empty boats, it clearly has the effect of creating a new toll.

4. BRITAIN V. THE CROMFORD CANAL COMPANY. M. T. 1819. K. B. 3 B. & A. 139.

By a canal act a toll of one pound per ton was imposed upon all coal-coke which should be navigated, carried, and conveyed upon any part of the said intended canal, from the place where the said canal should cross the river A. or from any place within two miles thereof, and passing in the direction towards Cromford. It appeared that the party who, it was contended, was in this case liable to the toll, had commenced his voyage at a place more than two miles from the point above mentioned, but had navigated his barge on a part of the said canal within the specified distance, and in the direction mentioned. The Court held, that the liability to the payment of the toll had been incurred, thinking that the words "navigated from," denoted a voyage from the place where the goods were laden on board the barge.

V. RATEABILITY OF TOLLS FOR RELIEF OF POOR.

See *post*, tit. Poor Rate.

VI. DESTROYING CANAL WORKS AND PUNISHMENT FOR COMMITTING ROBBERIES ON.

By 1 Geo. 2. st. 2. c. 19. s. 2. persons demolishing locks, etc. upon navigable rivers, are guilty of felony, and punishable by transportation for seven years; and if they return from transportation before the expiration of that term, they are liable to suffer death as felons; 5 Geo. 3. c. 33. s. 2. The 8. Geo. 2. c. 20. s. 1. after reciting the 1 Geo. 2. directs, that all persons pulling down etc. any lock, sluice, etc. on a navigable river, erected by authority of parlia-

Where a canal act imposing a toll for tonnage, enacts, that no boat of less burthen than 20 tons

should pass any lock, &c. without paying tonnage equal to a boat of 20 tons, not be liable to such toll.

Where by a canal act a toll of 11. per ton, in addition to the ordinary toll, was imposed upon all coal, &c. navigated upon any part of the canal from a particular place or from any place within two miles thereof, the Court held that the act contemplated a voyage commencing within the specific limits.

ment, or forcibly rescuing such offenders, shall be guilty of felony, without benefit of clergy, &c. By sect. 2. persons maliciously drawing up any flood-gate are punishable by imprisonment. By sect. 3. the prisoners are to be tried in an adjacent county; and, by sect. 5. offenders discovering or convicting are to be pardoned. The preceding statutes having expired, the 27 Geo. 2. c. 16 was passed to revive them; and by 4 Geo. 3. c. 12. s. 5. persons maliciously breaking down any banks, &c. opening flood-gates, or doing other wilful mischief to navigations, are guilty of felony, and may be transported for seven years.

Where a notice is required by a canal act before action brought for any thing done under its provisions, the defendant will be entitled to in [19] sist on the want of notice, although the line prescribed for the canal may have been departed from.

VII. NOTICE OF ACTION TO PARTIES ACTING UNDER CANAL ACTS.

AGAR V. MORGAN. H. T. 1816. Exch. 2 Price. 126.

This was an action of trespass against persons employed by the Regent's Canal Company, for having deviated from the plan described in the plan which had been adopted in the act of parliament incorporating the company. The plaintiff had obtained a verdict; but on a motion for a new trial, it was objected that the notice of action intended to be given under the 215th section of the act was irregular. In answer to this objection, it was urged that no notice was necessary in this case, because the trespass had not been committed by the defendants acting under the statute, but in violation of it, as they were expressly restricted to the line prescribed in passing over the plaintiff's land. They were, therefore, acting *colore*, and not *virtute officii*; and in so doing they were not entitled to the privileges or protection of the act.

Per Cur. A notice was necessary; for the defendants may be said to have been acting in pursuance of the act, although they may have so far deviated from the line of the canal prescribed by it as to render themselves liable to this action of trespass.

Canary Islands. See *post*, tit. *Insurance*.

Cancelling Acceptance. See *ante*, vol. iv. p. 375.

Cancelling Check. See *post*, tit. *Check*.

Cancelling Contracts and Deeds. See *post*, tit. *Contract*; *Deed*.

Candles. See *post*, tit. *Excise*.

1. THE ATTORNEY-GENERAL V. FORGE. E. T. 1801. Ex. FORT. 105.

Information on 26 Geo. 3. c. 77. s. 10. stating in the first count, that the defendant, after the 1st of August, 1786, on divers days and times between the 28th of November, 1797, and the exhibiting of the information, *did knowingly receive into his custody and possession* divers large quantities of British candles after the removal of the same from the place of manufacture, and where the duties in respect thereof were chargeable, before the said duties had been charged, or such candles condemned contrary to the statute, &c.; and in the second count, that *he had in his custody and possession, &c.* On the trial it appeared, that the defendant had a private manufactory of candles at E., which he afterwards sold in his shop in London, without having paid the duty. After verdict for the crown, it was objected, that the defendant having been proved to be the maker of the candles, the forfeiture incurred could not attach upon him under the enactment prohibiting persons having in their custody or possession candles after they had been removed from their place of manufacture, and before the duty was charged; for that clause only applies to the person who receives the candles from another, and therefore could not have reference to the maker. But the court held it penal in the defendant to remove them, and penal to have them in his possession after they had been removed; and his being the manufacturer could make no difference. The change of place was prohibited, and not the change of property.

The 26 Geo. 3. c. 77. s. 10. applies as well to the maker of candles as the receiver.

2. REX v. STEVENTON. E. T. 1802. K. B. 2 East. 362.

An information had been filed in this case against A. B. founded on the statute 26 Geo. 3. c. 77. which enacts, that if any person shall knowingly receive, buy, or have in possession any *British* spirits, soap, or candles, after the same shall be removed from the respective places where the same were made or manufactured, and where the same ought to have been charged with the duties payable in respect thereof, before the said duties, &c. have been charged, or before such *British* spirits, soap, or candles, have been condemned as forfeited, the offender, &c. shall forfeit the same, &c., and treble the value; and following the words of the statute, averred, that A. B. knowingly had such candles in his possession after they had been removed from the place of manufacturing, *and where the same ought to have been charged with the duties payable in respect thereof*, before the said duties to which the same were liable had been charged. It was contended that the word *British*, used in the statute, applied as well to candles as to spirits; and that, therefore, the candles charged to be in A. B.'s possession, &c. should have been alleged to be *British*, and that it was the more material, because foreign candles might be imported on payment of a certain duty, to which the regulations of the statute, on which the original information was founded, could not apply. But Lawrence, J. observed, that from the words used in the information, it was quite clear that the charge could only apply to the removal of home-made candles.

3. REX v. STEVENTON. E. T. 1802. K. B. 2 East. 362.

An objection was taken in this case to an information, founded on the 26 Geo. 3. c. 77. s. 10. which charged that A. B. did knowingly receive, and then and there had in his custody and possession, a large quantity of wax candles, to wit, &c. after the said candles had been removed from the place where the same were manufactured, and where the same ought to have been charged with the duties payable in respect thereof, before the said duties to which the same were liable had been charged, or before the said wax candles had been lawfully condemned as forfeited contrary to the form of the statute, &c. where-by, &c. &c. on the ground, that by the act two distinct offences were constituted; the one, the knowingly having in possession, &c. such candles, &c. after removal from the place of manufacturing, before the duty is paid; the other, the like having in possession, in any place, after such removal, before condemnation, without payment of the duties; whereas, upon the face of the above information, it was left uncertain which of these offences was meant to be charged. But Lawrence, J. said, the fact of removal before assessment being averred, and the fact of condemnation negatived, there was no uncertainty.

4. REX v. STEVENTON. E. T. 1802. K. B. 2 East. 362.

The statute 26 Geo. 3. c. 77. s. 10. enacts, that it shall not be lawful for any person whatsoever to commence, prosecute, enter, or file, or cause, or procure to be commenced, &c. any action, bill, plaint, or information, in any of his majesty's courts, against any person for the recovery of any fine, penalty, or forfeiture, incurred by virtue of any act or acts now in force, or hereafter to be made, relating to the revenues of customs or excise, unless the same be commenced, &c. in the name of the Attorney-General, or of some officer, of some one of his majesty's said revenues. In this case it appeared, that an information for a penalty for removing wax candles from the place of manufacturing before the duty paid (by sect. 10 of the above statute) had been prosecuted before the commissioners of excise, by one not averred to be such officer. It was contended that the commissioners of excise were constituted a court for the purpose of hearing and determining complaints relative to that branch of the revenue; and that no information could, by the express provisions of the statute, be instituted before them, except by the Attorney-General, or one of the revenue officers; that the occasion of making such provision was, that before that time offenders against the excise laws fraudulently procured their friends to commence prosecutions against them, which were afterwards faintly and insufficiently carried on; that it could not be supposed that the legislature, by passing the above acts only meant to suppress such frauds in the superior

An information for removing candles from the place of manufacturing before the duty paid, stating in effect that the candles were home-made candles, seems to be sufficient, without expressly naming them British candles.

So an information for removing wax candles from the place where manufactured, before they had been charged with the duties, or condemned describing the offence in having removed the candles before they were charged or condemned, seems sufficient.

And such information may be prosecuted before the commissioners of excise, in the name of a private individual.

courts of Westminster, and to leave them still open to be practised before the inferior tribunals, where it was probable the greater mischief lay, especially when they made use of such a general expression as "any of his majesty's courts," and that, even supposing the words "courts," must be taken to mean courts of record, yet that the court of the commissioners of excise was a court of record, as appeared from the statute of Geo. 2. stat. 2. c. 16. s. 4. which speaks of the *record* of their proceedings, and also from general reasoning and legal analogies. But the court said, the question now agitated is, whether the statute 26 Geo. 3. c. 77. s. 13. extends to proceedings before the commissioners of excise, not whether they fall within the legal definition of a court, but whether the legislature in this clause meant to comprehend them. To show that they were not intended to be included, it is a circumstance of some weight, that in no act of parliament which has been produced are they described; and upon looking through the several statutes, it is clear that they were not intended to be within their provisions. See 4 Inst. 475; 10 id. 103; 11 id. 43; 12 id. 388; 3 Bl. Com. 24; 2 Bl. 1146; 5 T. R. 210.

CANON LAW.*

1. MIDDLETON v. CROFT. M. T. 1737. K. B. 2 Stra. 1057; S. C. 4 Vin. Ab. 320; Ca. Temp. Hard. 57; And. 57; 2 Atk. 650.

The laity
are not com-
prehended
[22]
within the
words of the
canon
of 1603,

In prohibition, the plaintiff declared that by statute 7 and 8. W. 3. c. 35. a penalty of 10*l.* was laid on every man who married without licence or banns; notwithstanding which, he and his wife had been cited in the spiritual court, for having been married without licence or banns before eight in the morning, contrary to the canon; and that he and his wife being lay persons, were not bound by the said canon, or subject to the jurisdiction of the Spiritual court. On demurrer the Court said—the questions in this case are, whether by the canons of 1603 lay persons are punishable for a clandestine marriage; if not, whether by the ancient canon law the spiritual court is empowered to proceed against a person for such marriage. Upon the whole we are of opinion that a consultation ought to be had; since, *proprio vigore*, the canons of 1603 do not bind lay persons, we say, *proprio vigore*, because some of them are only declaratory of the ancient canon law. The statute 7 and 8 Wm. 3. does not, by the infliction of a penalty, take away the jurisdiction of the spiritual court.

2. PHILLIPS v. BURY. T. T. 1694. K. B. 1 Lord Raym. 7; S. C. Holt. 715; S. C. Comb. 265; S. C. 1 Show. 360.

Since they
are in no
case bound,
unless the
canons be
confirmed
by statute
or immemo-
rial usage.

In these cases it was resolved, that the subjects of this realm are not bound by

* The canon law is founded, partly on certain rules derived from the scripture; partly on the writings of the ancient fathers of the church; partly on the ordinances of general and provincial councils; and partly on the decrees of the popes in former ages. It is contained in two principal divisions, the Decrees and the Decretals. The Decrees are ecclesiastical constitutions made by the pope and cardinals. The Decretals are canonical epistles written by the pope, or by the pope and cardinals, at the suit of one or more persons for the ordering and determining some matter in controversy, and have the authority of a law. By 25 Hen. 8 c. 19. revived and confirmed by 1 Eliz. c. 1. it is declared that all canons not repugnant to the king's prerogative, nor to the laws, statutes, and customs of the realm, shall be used and executed. Lord Hardwicke, in 2 Atk. 605. cites the opinion of Lord Holt, and declares it is not denied by any one; that it is very plain all the clergy are bound by the canons, confirmed by the king only, but they must be confirmed by the parliament to bind the laity; see 2 Salk. 412. The canon laws influence four species of courts; 1st, The courts of the archbishop and bishops, and their derivative officers, usually called courts christian, or the ecclesiastical courts; 2d, the military courts or courts of chivalry; 3d, the courts of admiralty; and 4th, the courts of the two universities; which are either governed by act of parliament or custom, (for the peculiar justification of these courts. see titles, Admiralty Court, Ecclesiastical Court, Military Court, and University.) But the courts of common law have the superintending power over these courts, to keep them within their jurisdiction, to determine wherein they exceed them. to restrain and prohibit such excess; and, in the case of contumacy, to punish the officer who executes, and in some cases the judge who enforces, the sentence so declared to be illegal. An appeal lies from these tribunals to the king, which shows that the jurisdiction exercised in them is derived from the crown of England, and not from any foreign potentate or intrinsic authority of their own; see 25 Hen. 8. c. 21.

any canon, unless confirmed by an act of parliament, and thereby incorporated into the common law, or received time out of mind, &c. and then it becomes part of the canon law, and consequently binding on the subject. See 12 Mod. 238; 2 Salk. 412; id. 672.

Caons. See *ante*, tit. *Canon Law*; and *post*, tits. *Dean and Chapter*; *Ecclesiastical Persons*.

Canvass.

ATTORNEY-GENERAL V. BRANDON. M. T. 1817. Ex. Ch. 3 Price. 360. The statutes which imposed duties on 'linen, painted, stained, or printed, &c.' Geo. 1. c. 69; impose certain duties on "linen, printed, painted, stained, or printed, &c." It was contended that the present case was not within the meaning or extend to policy of such statutes. It appeared that the defendant was a painter of theatrical scenes; that the canvass employed for that purpose necessarily underwent a previous process, technically called *priming*, by laying on a surface of white paint, which is generally a peculiar employment, requiring a licence, and the produce bearing a duty, but which defendant had, in the present instance, performed himself. *Per Cur.* We think that the objection that canvass is not linen within the statutes, will not bear discussion, for that very article is denominated linen in various legislative enactments. As to the question, whether the defendant, under the circumstances, is liable to pay a duty, we must premise that the preparation of canvass for the purposes of painting like those in question, is generally the business of a peculiar avocation, the followers of which are obliged to take out a licence to conduct it, and the linen when printed is subject to the payment of a duty; this being established, it requires little argument to show, that if the defendant has taken on himself the office of the primer, and by performing such acts as require a licence, incurred a duty, he must pay the demand on it. The supposed inconvenience arising to artists from their liability to such duties, may be easily obviated by purchasing the canvass after it has been properly primed or prepared for painting. Judgment for the crown.

Capacity.

See tits. Attainder,	Leper,
Baron and Feme,	Lunatic,
Bastard,	Monk,
Hermaphrodite,	Monster,
Idiot,	Nun.
Infant,	

Cape of Good Hope. See tits. *Colonies*; *East India Company*; *Insurance*.

Cape Fingsterre. See tit. *Colonies*.

Capias pro fine.

LINDSEY V. CLERKE. M. T. 1696. K. B. 5 Mod. 285; S. C. 12 id. 104; S. C. 1 Salk. 54; S. C. Comb. 387; S. C. Carth. 390.

In ejectment on a writ of error, a motion was made for the opinion of the Court, whether a *capiatur* should be awarded against the defendant, which had been usually done *ex officio* for a fine to the king, for a breach of the peace. The 5 & 6 W. 3. c. 12. was referred to, which directs, "that no *capias pro fine* shall be presented against the defendant, either in trespass, ejectment, assault, or false imprisonment; but in lieu thereof, the plaintiff is to pay the proper officer, upon signing judgment, 6s. 8d. over and above the usual fees." The Court accordingly held, that it would be error to have a *capias* awarded, [24]

* Before that statute, in actions of trespass and ejectment, a *capias pro fine* used to issue in pursuance of a *capiatur*, and the defendant was obliged to compound for the breach of the peace by paying a small fine to the master; see 2 Saund. 193. n. 1.

since the act prohibits its execution by remitting the fine, The *capias* should be wholly omitted.

Capias in Civil Proceedings.

The term *capias* is a word of very general application; it signifies that "you take;" and is used in a variety of legal proceedings. The origin of the process, commonly known by that name, has been already succinctly examined; see vol. ii. p. 262. In the note to the law of arrests, it was shown, that at common law, the *person* of the defendant was holden exempt from legal arrest or detention, except in the case of injuries accompanied with force; and that as regarded such aggressions, a *capias* or writ to take and detain the body of the accused was allowed. But this immunity of the person, as pecuniary transactions increased, frequently produced much injustice; a *capias* was ultimately allowed to arrest the person in action of *account*, without suggesting a breach of the peace, by stat. Marl. 52 Hen. 3. c. 23. West. 2 13. E. 1. c. 11. In *debt* and *detinue*, by stat 23. E. 3. c. 15; and in all actions on the *case*, by stat. 19 H. 7. c. 9; or, in other words, a right to a *capias*, and the privilege of arresting the party, were made commensurate.

In practice, the term *capias* in civil proceedings is generally applied to a writ in the Courts of K. B. and C. P. known by that appellation. The former will be explained and illustrated under the title of Original Writ, Proceedings by; and the latter under the immediately succeeding title of *Capias ad respondendum* in C P.

Capias in Criminal Proceedings.*

Capias ad Respondendum in the Common Pleas.

See tit. Ac Etiam,	Misnomer,
Affidavit of Debt,	Penal Action,
Bond,	Process,
Escape,	Sheriff.
Limitations, Statute of;	

I. PRÆCIPE FOR, p. 25.

II. WITH WHOM TO BE TAKEN OUT, TO WHOM TO BE DIRECTED, AND INTO WHAT COUNTY TO BE ISSUED, p. 25.

III. TESTE OF, WHEN TO BE RETURNABLE, AND OF INSERTING FILACER'S NAME, p. 27.

[25]

I. PRÆCIPE FOR.

BOYD V. DUBAND. M. T. 1809. C. P. 2 Taunt. 161, overruling HAY V. MANN. E. T. 1749. C. P. Barnes. 117.

It is not necessary that a clause of *ac etiam* should be inserted in a *præcipe* for a bailable *capias*.

This was an application that the defendant might be discharged on common bail; it was urged among other grounds that the *præcipe* given to the filacer, contained no clause of *ac etiam*; after stating the intended return on "oath for 8,900*l.* and upwards," and that the case of Hay v. Mann, Barnes, 117. was a decisive authority to show that the *præcipe* should contain the *ac etiam* clause; but against this case it was contended, and the argument adopted by the Court, that a *præcipe* is only an authority given by the attorney in the cause to the filacer, from which he is to prepare the original writ, and could not be brought within the meaning of the statute, 13 car. 2. s. 2. c. 2. requiring the

* This is the ordinary writ by which actions are commenced in the Court of Common Pleas, and is founded upon a supposed original, and corresponds with the Bill of Middlesex; see *post*, tit. Middlesex, Bill of; or *Latitat*; see *post*, tit. *Latitat*, Writ of, in the King's Bench: in point of form, it is *common* or *special*. Where the cause of action is not bailable, it is in the general form, commanding the sheriff to take the defendant, &c. to answer the plaintiff of a *plea*; wherefore with force and arms the close of the plaintiff at, &c. he broke and other wrongs to him did to the great damage of the plaintiff and against the peace, &c. But where the cause of action is of a bailable nature about 40*l.* (see Lookwood v. Hill, *ante*, vol. i. p. 160.) an *ac etiam* is inserted in the process or special clause, beginning with those words shortly describing the cause of action.

If the defendant in a bailable action cannot be taken on the first writ before it is returnable, the plaintiff may have one or more writs of *capias* by *continuance*, in order to arrest him in the same county, and need not sue out an *alias* or *pluries capias*. The writ by *continuance* is in the same form as the first *capias*; and in any of these writs. if the de-

true cause of action to be particularly expressed in any writ, bill, or process. Rule discharged.

II. WITH WHOM TO BE TAKEN OUT, TO WHOM TO BE DIRECTED, AND INTO WHAT COUNTY TO BE ISSUED.*

1. WILLIAMS v. GREGG. M. T. 1816. C. P. 2 Marsh. 550; S. C. 7 Taunt 233. S. P. WILLIS v. PENDRILL. H. T. 1806. C. P. 2 N. R. 167.

A rule nisi was obtained to set aside an interlocutory judgment, and all further proceedings in this cause, on the ground of irregularity; the writ having been directed to the sheriff of Kent, and served at Deal, which place was within the liberty of the cinque ports. The case of Willis v. Pendrill, 2 N. R. 167. was cited as analogous; the Court having there decided that a *capias ad satisfaciendum* directed to the sheriff of Middlesex, would not run into London; cause was shown against the rule, on the ground that the same officer issued writs for the county of Kent, and for the cinque ports; and that the Court of King's Bench in the cases of Kelly v. Shaw, 6 T. R. 74. and Busby v. Fearon, 8 T. R. 235. had recognised the practice contended for.

Pec Cur. The general rule adopted in these cases by the Court of K. B. varies from the practice of the Court of P. C. on principle, as one officer issues writs for all counties in the former Court, whereas in the latter, the officer is separate for each county. It has been attempted to assimilate the circumstances of the present case, because the same officer issues writs for the county of Kent, and for the liberty of the cinque ports. But however that circumstance may be entitled to weight, it will perhaps be expedient to preserve consistency in the practice of each court.—Rule absolute.

2. BRACEBRIDGE v. JOHNSTON. E. T. 1819. C. P. 3 B. Moore. 237; S. C. by the name of BRACEBRIDGE v. JOHNSON. 1 B. & B. 12.

A motion was made in this case to quash a writ of *capias ad respondendum*, and to set aside the proceedings thereon, on the ground of irregularity. It appeared that the writ, which was serviceable, was directed to the chamberlain of the county palatine of Chester, and commanded "him or his deputy to take the defendant and J. D. if they should be found, etc., and them safely, etc. so that, etc." instead of directing a mandate to the sheriff, it was urged for the plaintiff, that it was quite immaterial to the defendant whether or not the writ was served by the proper officer, as he had similar notice in both cases, and beside that, in the mode adopted less expense was incurred.

defendant reside within a liberty, there may be inserted a clause of *non-omittas*; see *post*, tit. *Non-omittas* and Process;) empowering the officer or sheriff to enter, notwithstanding the alleged franchise,

Writs of *capias* are issued on a proper *præcipe* or note of instructions, and signed by the filacer, to whom the sheriff's attorney should deliver a memorandum or minute of his warrant. The writ is then sealed, and in bailable cases it is usual to make an affidavit of the cause of action before the filacer or his deputy.

As most of the rules connected with the rules of *capias* are equally applicable to bills of Middlesex, *latitat*, &c. the cases in the text will be confined to those decided directly upon the writ of *capias*; and as peculiar to itself, the other authorities will be arranged under the general title of Process.

* The writ must be issued from the office of the proper filacer; see *post*, tit. Filacer. It was formerly necessary where the defendant resided in a different county than that in which the plaintiff intended to lay the venue, to sue out a *capias* into the latter county, and then a *testatum* into the other, for the plaintiff lost his bail if he declared in any other county than that in which the *capias* issued, as is still the case by original in the King's Bench; but a rule having been made in the Common Pleas; 1 B. Moore. 514. that where the defendant is arrested by virtue of a *capias ad respondendum* in any county, and bail is put in thereupon, the plaintiff may declare in a different county, without its being deemed a waiver of the bail; see *post*, tit. Declaration; it is now usual to sue out a *capias* at once into the county in which the defendant resides; and when he cannot be found in that county, the plaintiff's attorney may sue out a *capias* or *testatum* into another; see *Clemson v. Knox, ante*, vol. iii. p. 129. Where the first *capias* issued on an affidavit of debt sworn before and filed with the filacer of the second county; abridged *ante*, vol. i. p. 424. the 12 G. 1. c. 29. s. 2. requiring that the affidavit should be sworn before the officer who issues the process or his deputy; but where a *testatum* issues, a new affidavit is unnecessary; *Boyd v. Durand*, vol. i. p. 397.

A *capias ad respondendum* directed to the sheriff of one county cannot be served in another county. Nor into a franchise within the same county.

And the circumstance of the same officer being filacer will make no difference.

A *capias ad respondendum* directed to the Chamberlain of the county palatine of Chester, commanding him to take the defendant, is irregular.

Per Cur. The chamberlain is by this writ directed to do what he has not legal power to effect; the regular mode is to direct the chamberlain to issue his mandate to the sheriff of the county wherein the franchise lies; this has not been done—therefore the writ is void. Rule absolute.

[27] III. TESTE OF, WHEN TO BE MADE RETURNABLE, AND OF INSERTING FILACER'S NAME.

A *capias ad respondendum* must be tested in term time.

1. BENNET V. SAMPSON. E. T. 1733. C. P. Barnes. 407; S. C. Ca. Prac. 436. S. P. WASS. V. CORNET. H. T. 1736. C. P. id. 438.

The *capias ad respondendum* was tested on the 13th February, which was the day after the end of H. T. A rule to quash it, after rule shown, was made absolute.

And also re turnable therein.*

2. MILLS V. BOND. T. T. 1720. C. P. 1 Stra. 399.

In debt on a bail bond it was objected that the process appeared to be returnable on a day out of term; it was urged that the defendant should have pleaded the stat. Hen. 6. But the Court held it not necessary this being a void process; the plaintiff had leave to discontinue.

3. DAVIS V. OWEN. M. T. 1798. C. P. 1 B. & P. 342.

If a *capias per continuance* be tested on the same day as the original *capias*, a new original *capias* may be sued out to warrant it, though such new original be tested before the cause of action accrued.

The defendant having put in bail with the wrong officer, the plaintiff took an assignment of the bail bond, and thereon sued out a writ of *capias ad respondendum*, tested the 6th November, and returnable the 18th of November, against Owen and another defendant Thomas, who alone was served therewith; a *capias per continuance* tested also on the 6th November, was afterwards sued out and served on Owen. A rule nisi was obtained to set aside the proceedings on the bail bond, on the ground that the continuance was improperly tested, as to be regular it should be tested on the return day of the original *capias*. Buller, J. held the objection insufficient, as a new original *capias* might be sued out to warrant the teste of the *capias per continuance*; and observed that the practice of amending writs of *capias* had been much extended by Gould, J. who assigned as a reason for so doing, that the *capias* never appears on the record; it is immaterial whether it is tested before the cause of action accrues.

4. STEEL V. CAMPBELL. H. T. 1809. C. P. 1 Taunt. 424.

And the Court will not set aside the proceedings on a *capias ad respondendum*, because the English notice requires an appearance on a day preceding the teste.

A rule nisi was obtained to set aside the proceedings on a *capias ad respondendum*, tested 28th November, in the 49th year of his majesty's reign, returnable in eight days of St. Hilary, on the ground that the English notice directed by the statute, required the defendant's appearance on the 20th January 1803. Holden that the error was immaterial as the period of the year at which the appearance was required, was sufficiently determined by the return; and as no person could possibly suppose that his appearance was required on a day already past.—Rule discharged.

See 7 T. R. 63; Barnes. 425; 1 Chit. Rep. 384 and 385. n.

5. RENALDS V. SMITH. E. T. 1816. C. P. 6 Taunt. 551; S. C. 2 Marsh. 358.

It must not be made returnable before his majesty at Westminster.

This was an action on a bail bond. The declaration stated, that upon a *capias* returnable in the Common Pleas, the sheriff made a mandate to the high bailiff of *Pomfret* to take the defendant, so that the sheriff might have him before his said majesty at *Westminster*, in five weeks of Easter. On demurrer to this declaration, it was contended that an appearance before his majesty at *Westminster*, intended an appearance in the Court of K. B.

Per Cur. It is stated in the declaration that the *capias* required the party to appear before our lord the king of *Westminster*, and the bail bond corresponds with this requisition. It is clear that the description of the court is wrong, and the demurrer must be allowed.—Judgment for defendant.

See 3 M. & S. 166.

6. ATKINSON V. TAYLOR. E. T. 1760. C. P. 2 Wils. 117. over-ruling WILLIAMS V. FAULKNER. Barnes. 295.

There must be 15 days

This was a motion to set aside a *capias ad respondendum*, because 15 days

* It may be tested, however, before the cause of action accrued, except where it is intended to proceed to outlawry; see *post*, tit. Process.

did not intervene between the *teste* and return. The Court granted the application, and overruled William v. Faulkner.

7. PARSONS v. LOYD. M. T. C. P. 1 Bl. 845; S. C. 3 Wils. 341.

This was an action of trespass and false imprisonment. The pleas were 1st, not guilty; 2dly, a justification for that the plaintiff was indebted to the defendant in 21l. 12s. for which, on the 27th of October, 1770, he, the said defendant, sued forth a *capias*, returnable in eight days of St. Hilary, for 42l. and marked the same for bail, to the amount of 21l. 12s. upon which the present plaintiff afterwards, and before the return of the writ, viz. on the 6th of November was arrested; the plaintiff replied, and admitted the suing forth of the *capias*; but alleged, that it was afterwards set aside by the court for irregularity, by reason of its bearing *teste* in Trinity term, and not being returnable before Hilary term following; to this the defendant demurred, and the plaintiff joined in demurrer. De Grey, C. J. (after argument) This is not a new question, the *capias* being *tested* in Trinity term, and returnable in Hilary term next following, is void, and a mere nullity; there is a difference between writs of mesne process, and writs of execution; for in the case of writs of mesne process, if a term be omitted between the *teste* and return, the cause is out of court, if it be in a personal action, for in real actions it is otherwise; in them there must be nine returns between the *test.* and return; also in the case of a writ of execution. the cause is come to its end; and on a *capias ad satisfaciendum* a defendant ought to lie in execution, and the sheriff ought to have his body always ready to bring to the court, when he shall be commanded by *habeas corpus*, etc. But in cases of mesne process, it would be hard to suffer so long a return, because the body must lie in prison, without having an opportunity to make a defence, when perhaps he is able to make a good defence. These are distinctions taken between writs of *capias* with respect to real actions, personal actions and executions, by Holt, C. J. 1 Ld. Raym. 775. 776. which is good law. The present plaintiff has been illegally imprisoned, under colour of a writ sued out against him, which is a mere nullity; he has been unlawfully injured, and must have a remedy; but he has none against the officer, who is not to exercise his judgment touching the validity of the process in point of law, but is obliged to obey the command of the courts at Westminster, or other superior courts, having general jurisdiction; and he may justify under the writ although it be void; the officer not being liable; it is clear from one Lev. 95; 1 Sid. 272, and many other cases which might be cited, that this action well lies against Lloyd, the party himself; who sued out this void writ; and to say now that this action does not lie against the party himself, would be *quiescere movere*. There is a great difference between erroneous process, and irregular, that is to say void process; the first stands valid and good until it be reversed, the latter is an absolute nullity from the beginning; the party may justify under the first until it be reversed, but he cannot justify under the latter because it was his own fault that it was irregular, and void at the first. It is said that trespass *vi et armis*, is not the proper action, and that a man cannot be made a trespasser by relation; but relation is not at all applicable to this case, for Lloyd, who sued out this void irregular writ, and caused Parsons to be unlawfully arrested thereupon, was the principal mover or trespasser in this case; the act of an attorney is the act of his client, and I am very clearly of opinion, that trespass *vi et armis* well lies, and therefore the plaintiff must have judgment. Gould, Blackstone; and Nares, Js. concurred in giving judgment for plaintiff.

between the *teste* and return.

And where a whole term intervenes, the writ is void and trespass and false imprisonment lies against the plaintiff.

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8. BOURCHIER v. WITTLE, M. T. 1789. C. P. 1 H. Bl. 291. S. P. DAVIS v. OWEN. M. T. 1798. C. P. 1 B. & P. 342. S. P. CARTY v. ASHLEY, 1773. T. T. 2 Bl. Rep. 918; S. C. 3 Wils. 454.

Motion to set aside proceedings on a *capias* for irregularity, there not being 15 days between the *teste* and return. But the court directed an amendment, and the applicant took nothing by his motion.

9. WHALE v. FULLER. E. T. 1789, C. P. 1 H. Bl. 222.

This was an application to set aside a *capias* for irregularity, the service of

But it has been held on that the *teste* and return may be mended. Tho' in a prior case it had been decided to be irregular to

serve a *ca-* the writ being after the date of the return, and there not being 15 days time
pias after between the *teste* and the return. These were admitted by the court to be ir-
 the date of regularities, but were holden to be aided by the defendant having taken the
 the return. declaration out of the office.

10. *INMAN v. HUTCH.* H. T. 1806. C. P. 2 N. R. 133.

As a *capias* is founded upon a supposed original, it should be made returnable on a general return day. Though if a day be specified, the Court will allow it to be amended.
 A writ of *testatum capias* was made returnable on the last day of Michaelmas term, and the defendant was arrested thereon; a rule nisi was obtained to set aside the proceedings for irregularity, on the ground that the writ should have been returnable on a general return day. Holden that the objection was supported by the uniform practice of the court.—Rule absolute See 5 Tassnt. 883.

11. *WALKER v. HAWKEY.* M. T. 1814 C. P. 1 Marsh, 399; S. C. 5 Tassnt. 853.

On a rule nisi to set aside the proceedings had on a writ of *capias ad respondendum*, on the ground of irregularity, it appeared that the writ had been made returnable on "Tuesday next, after eight days of St. Martin, being, &c." instead of a general return day; but the court allowed the plaintiff to amend on the terms of paying the costs of amendment, and of the application.—Rule discharged. See 1 B & P. 342; 5 East. 291; 2 N. R. 153.

CAPIAS AD SATISFACIENDUM.

See also *titl.*

Amendment, vol. i. p. 593,

Escape,

Execution,

Judgment,

Poundage.

Prisoner,

Rescue,

Scire facias.

I. IN WHAT CASES IT MAY BE ISSUED, AND WHEN NOT, p. 30.

II. AGAINST WHOM IT LIES, AND AGAINST WHOM IT DOES NOT, p. 31.

III. FORM AND REQUISITES OF, p. 32.

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V. HOW EXECUTED; SHERIFF'S DUTY THEREON, AND OF THE EFFECT OF A PAYMENT TO THE SHERIFF, p. 34.

VI. RETURN TO, p. 34.

VII. WHAT WRITS MAY ISSUE AFTER IT. p. 35.

VIII. HOW FAR A TAKING UNDER IS DEEMED A SATISFACTION, p. 37.

IX. WHEN SET ASIDE, p. 40.

X. TO CHARGE BAIL, (see Bail. vol. iii. p. 198.)

I. IN WHAT CASES IT MAY BE ISSUED, AND WHEN NOT.*

MACKEREL v. HAMBERTON. H. T. 1737. C. P. Ca. Prac. 198.

After a writ of error had been brought the plaintiff left a *capias ad satisfaciendum* with the sheriff, in order to be returned *non est inventus*, but the court held it irregular.

[31] II. AGAINST WHOM IT LIES, AND AGAINST WHOM IT DOES NOT.

1. *GARDINER v. HOGG.* M. T. 1745. K. B. 2 Stra. 1217.

* As a general rule, *capias ad satisfaciendum* lies where a *capias ad respondendum* or *latitat* might have been used, as the process to bring the defendant into court. Hence it is sustainable *after judgment* at common law in action of trespass; 3 Co. 12; Hob. 56; and by statute in actions of account, 52 Hen. 8. c. 28; 18 Edw. 1. c. 11; debt, debtinue, replevin; 25 Edw. 8. c. 11; case; 19 Hen. 7. c. 9; annuity, covenant; 23 Hen. 8. c. 14; popular actions; 21 Jac. 1. c. 4; and in actions for forcible entry; 23 Hen. 8. c. 14. And the same rule holds, whether the defendant has been holden to bail at the commencement of the action or not; see 2 Stra. 822; id. 1217.

An infant was sued by *prochein amy*, and there was a verdict against him, An infant seems to be liable to a *capias ad satisfaciendum*.^{*} and judgment for costs. And now being taken in execution, he moved to be discharged; and cited Cro. Eliz. 33; Cro. Jac. 640.

Per Cur. If costs cannot be given, it will be matter of error to be insisted on hereafter: but we will not discharge him on motion. Where he is a defendant he is certainly subject to costs.

2. By the 57 Geo. 3. c. 99. 47. no costs incurred by any spiritual person, But a *capias ad satisfaciendum* does not lie against a spiritual person for the penalty incurred by non-residence.† by reason of any non-residence on his benefice, shall be levied by execution against the body of any such person, while he shall hold the same, or any other benefice, out of the profits of which the same can be levied by sequestration within the term of three years; and in case the body of any such spiritual person shall be taken in execution for the same, the court in which the same was recovered, or any judge thereof, may and shall, upon application made for that purpose, discharge the party from such execution, in case it shall be made appear to the satisfaction of the court or judge, that such penalty and costs can be levied as aforesaid.

III. FORM AND REQUISITES OF.*

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1. CLARKE V. CLEMENT AND ANOTHER. H. T 1796. K. B. 6 T R. 525. The *capias ad satisfaciendum* issued against both on a joint judgment, was set at liberty by the plaintiff, on an undertaking by him to render himself on a given day, if he did not in the mean time pay the debt. Whereupon the other defendant moved, that the writ of *capias satisfaciendum* should be quashed, which was immediately ordered. The plaintiff then sued out a separate execution against A. B., and took him a second time; upon which he moved to be discharged out of custody, and to have the *capias ad satisfaciendum* set aside, and satisfaction entered on the roll, on the ground that a separate *capias ad satisfaciendum* on a joint judgment could not be sustained. And the court made the rule absolute. ^{The *capias ad satisfaciendum* must be consistent with the judgment, therefore, a *ca. sa.* against one on a joint judgment is irregular.}

2. By 13 Car. 2. stat. 2. c. 2. s. 6. it is enacted, that "in all actions of debt, and other *personal* actions; and also in actions of *ejectment*, depending by *original* writ in the courts of King's Bench and Common Pleas, after any judgment obtained therein, there need not be fifteen days between the *teste* and return ^{It is not essential that there should be 15 days between the *teste* and return.‡}

* So an attorney or officer of the court, or bail; see 2 Stra. 829; or a *feme covert* may be taken on a *capias ad satisfaciendum*; see 4 East. 521; 2 Stra. 1167; Wils. 149; Sayer. 149. But in actions against husband and wife, it is now the practice to discharge the latter: see 2 Tidd. 1048; ante, vol. 4. p. 144.

† And the same rule applies to members of the royal family, peers or peeresses, members of the house of commons during their privilege, members of corporations or hundredors, ambassadors or their servants; see 7 A. c. 13. s. 3; seamen or soldiers in his majesty's service; unless in actions for a debt of 20l. or upwards, contracted previously to their entering the service; aliens who have fled to this country in consequence of the revolution in France, for debts contracted abroad; bankrupts who have obtained their certificate for any debt which might have been proved under their commission; executors or administrators, unless a *devastavit* had been returned; ordinary or menial servants of the king, or of a queen *regnant*, unless leave has been previously obtained of the lord chamberlain of the king's household; see 5 T. R. 686; heir on a special judgment for the debt of his ancestor; see 3 Blac. Com. 414; and persons attending a court of justice; see 3 T. R. 79; 1 H. Bl. 636; 5 T. R. 209. If the *capias ad satisfaciendum* be executed in a case where it does not lie, the party will be discharged upon application to a judge at chambers, or to the court from which the writ issued; see 5 Geo. 2. c. 30. s. 13; 4 Taunt. 631.

‡ This writ, in point of form, is a command to the officer to whom it is directed to take the defendant and him safely keep, so that he may have his body on the return day. &c.

§ If a defendant be sued by a wrong name, and omit to take advantage of the misnomer, he may be arrested on a *capias ad satisfaciendum* by such wrong name; see 2 Stra. 1218; post, tit. Misnomer.

§ Though it formerly was; See 1 Tid. 1044. The *capias ad satisfaciendum* should be regularly returnable on a general return day, or day certain, according to the nature of the original process; see 3 Wils. 58; and for the purpose of charging bail, there ought to be eight days between the *teste* and return by bill; see 2 Salk. 602; and fifteen by original; 13 Car. 2. stat. 2. c. 2. s. 6; but a *capias ad satisfaciendum* returnable out of term, is not void as against the bail, though it may be set aside by the principal; see ante, vol. 3. p. 198.

of any writ of *feri facias* or *capias ad satisfaciendum*, nor shall the want thereof be assigned for error."

3. *SHIRLEY v. RIGHT*. T. T. 1702. K. B. 7 Mod. Rep. 30; S. C. Holt. 761. S. C. 1 Salk. 273; S. C. 2 Lord Raym. 775; S. C. 3 Danv. 121.

And there may be an intervening term between its tests and return.

In an action of debt for an escape of one taken on a *capias ad satisfaciendum*, which appeared to be returnable the term next but one after the *teste*, so that a term intervened, after a verdict for the plaintiff, it was moved in arrest of judgment, that the writ was merely void, and consequently there could be no escape, and the sheriff did right to let him go. But Holt, C.J. said this action

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lies against the sheriff, and there is a difference between a *capias* in mesne process, and a *capias* in execution. In mesne process, if a term be omitted, the writ is void in all personal actions, and the sheriff shall not be charged; for the cause is discontinued, and out of court by the intermission; and by not having a day in court by the return of the writ as he ought, the party may be greatly prejudiced by reason of the imprisonment in the mean time. But in executions, a *capias ad satisfaciendum* omitting a term is not void, for the party is not to have a day in court; his cause is at an end, and he must be in prison, whether the writ be returned or not; nor is it necessary it should be returned.

See 3 Cro. 468; Poph. 271; Sty. 339; 1 Ro. 242; 2 Bulst. 256; 3 Cro. 188.

And after its return, any irregularity in suing it out and filing it, cannot be taken advantage of.

4. *MILSTEAD v. COPPARD*. E. T. 1793. K. B. 5 T. R. 272.

On motion to set aside a *testatum capias ad satisfaciendum*, on the ground that no original had been issued to warrant it, it was contended, that though no advantage could be taken of an irregularity in the *capias ad satisfaciendum* after a writ of error had been brought, it might be done after error brought, where the original *capias ad satisfaciendum* was not returned by the sheriff, or entered on the roll. But the court said, the plaintiff might cure the objection, even after error brought; but were inclined to think that, as the original *capias* in this case had not been entered on the roll, the objection was fatal. On a subsequent day, the writ appearing to be properly entered on the roll, the writ was discharged.

If judgment be given against four, and pending a writ of error one dies, and the year expires, a *capias ad satisfaciendum* may be taken out against survivors with the survivors; that was sufficiently revived by the several writs of error. 2dly, out a *scire facias* or *re mittitur*.

IV. WHEN AND HOW SUED OUT.*

HOWARD v. PITT AND OTHERS. T. T. 1692. K. B. 1 Show. 402; S. C. Holt. 1; S. C. Carth. 236; S. C. 1 Salk. 261.

In trespass against four defendants, the plaintiff recovered. A writ of error being brought in the Exchequer Chamber, it pended a year, and then abated by the death of one of the plaintiff's in error; another writ was brought, which pended half a year, and abated by the death of another plaintiff. No new writ of error being brought, the plaintiff in the original action sued out execution by *capias ad satisfaciendum* against the survivors. On motion for a *supersedeas* to this *capias ad satisfaciendum*.

Per Cur. Here is no need of a *scire facias* to revive the judgment against the survivors; that was sufficiently revived by the several writs of error. 2dly, Where a writ of error determines in the Exchequer Chamber by abatement or discontinuance, the judgment is not again in this court till there is a *remittitur*.

* Formerly the *capias ad satisfaciendum* was stamped with a 5s. stamp; but now by the 4 Geo. 4. c. 68. that duty is repealed. In the King's Bench it need only be sealed; Imp. K. B. 444. but in the Common Pleas it must be signed and sealed, Imp. C. P. 491. and, by late rule, writs of execution cannot be sealed, without producing the judgment-paper, postea, or inquisition, 5 B. & A. 560, 1 D. & R. 471. It seems necessary that it should be indorsed, see 8 Mod. 189, unless it be for a penalty, and the execution be for less than the penalty, then the sum to be levied ought to be specified, 1 Arch. Prac. 278, and in practice, it is usual to indorse it thus, "levy the sum of £. besides officers' fees, &c. A. B.,—street, Plaintiff's attorney." And if the action were against a seaman or soldier in his majesty's service, for a debt contracted previously to his having entered the service, an affidavit must be made that the debt, damages, and costs amount to 20l. or upwards, and that the debt was contracted previously to the defendant having entered his majesty's service, and a memorandum of such oath indorsed on the writ before its execution, see 1 Geo. 2. st. 2. c. 14. s. 15. 32 Geo. 2. c. 38. s. 22.

entered for without such *remititur*, it cannot appear to this court but that the writ of error is still pending in the Exchequer Chamber. 3dly, The execution was erroneous for this cause, but not void.

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V. HOW EXECUTED SHERIFF'S DUTY THEREON,* AND OF THE EFFECT OF A PAYMENT TO THE SHERIFF.

1. TAYLOR V. BAKER. E. T. 1677. K. B. 2 Mod. 214; S. C. 2 Jones. 97; S. C. 2 Lev. 203; S. C. 1 Freem. 453; S. C. 3 Keb. 348. S. P. ANON. M. T. 1698. K. B. 12 Mod. 230.

A man being in execution, paid the money to the marshal for which he was imprisoned, and thereupon discharged. Upon the question whether he was bound to pay it over again to the plaintiff upon a second execution, the court were of opinion, that the payment to the marshal was no discharge to the plaintiff, at whose suit he was in execution; consequently the defendant was bound to pay the money over again, and take his remedy against the marshal.

A payment of the sum indorsed on the writ to the marshal

- 2; ANON. M. T. 1698. K. B. 12 Mod. 230.

Per Holt, C. J. A sheriff has no power to receive money from the defendant upon a *capias*, for his business is only to execute the writ; and if in such case a defendant pay the sheriff, and he afterwards become insolvent, and do not pay the plaintiff, such payment shall not excuse the defendant.

Or to the sheriff, is not a payment to the plaintiff, and therefore no discharge.

3. MORTON'S CASE. M. T. 1680. K. B. 2 Show. 139.

To debt on judgment, plea that the plaintiff had prosecuted a *capias ad satisfaciendum* upon that judgment, and that the plaintiff had paid the money to the sheriff. On demurrer, the court said that such payment was no discharge. But it would have been otherwise if the money had been paid to the plaintiff's attorney on the record, for that would have been payment to the plaintiff himself. See vol. ii. 594.

But payment to the plaintiff's attorney is good.

VI. RETURN TO.

To compel a return the sheriff must be ruled, and, when ruled, if he has taken the body, he must return *cepi corpus*, and have the body ready in court at the return day; Br. Ret. 107; or if the defendant cannot be found, *non est inventus* may be returned; Liber. intrand. 109; or he may make a special return, as, that the defendant is a privileged person, or that he has become bankrupt and obtained his certificate; see Tidd. 1045; 4 Taunt. 631. If after the work has been executed by the sheriff, the plaintiff receives the demand, the sheriff ought, if ruled, to return that he has taken the body, but released him on payment of the debt or damages to the plaintiff; Dr. & St. 18; Dalt. 138; for we have seen that he must not return that he has released the body on payment of the debt, &c. he having no power to receive the money; see ante, p. 34. So a return of *tarde* to a *capias ad satisfaciendum* is not good; 5 Com. Dig. 444; or the answer of a bailiff of a franchise *quod tarde*, for it is the duty of the sheriff to have the writ returned in the time; 2 Roll 461. Nor can he return a rescue. Cro. Car. 240. If a writ of execution be delivered to the sheriff against a prisoner in gaol, who is attainted of felony, the sheriff may return that the prisoner is attainted, and that therefore he cannot take him in execution; but if the writ be delivered after the attainted person has received a pardon, it must be executed as if the attainder had never occurred; Dalt. 214. If the old sheriff goes out of office after the execution of the writ, he returns such writ in his own name, and the new sheriff returns thus: This writ, as above indorsed, was delivered to me, the undersigned, now sheriff, by the above-named late sheriff, at the time of his going out of office; Leigh v. Turner, cited Imp. sheriff, 304.

VII. WHAT WRITS MAY ISSUE AFTER IT.†

* The same rules which apply to making an arrest on mesne process (see ante, vol. ii. p. 320 to 338) extend to the execution of a *capias ad satisfaciendum*, except that upon an arrest on the latter the officer may take the defendant at once to the county gaol, instead of waiting till the expiration of 24 hours; Evans v. Atkins 4 T. R. 555 abridged ante vol. ii. p. 338.

† If the *capias ad satisfaciendum* be not executed, the plaintiff may sue out any other writ of execution, or he may have a writ of *alias*, or *pluries capias ad satisfaciendum* (Yelv. 52) into the same county, or a *testatum* into a different county, or he may have a

A capias ad satisfaciendum may be issued after a fieri facias has been sued out;

But only one can be executed,

Until the other has been finally returned;

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And the partial execution of a fieri facias will prevent the execution of a capias ad satisfaciendum before the former is returned,

But where a distress was in a house during all the time the sheriff remained there under the fieri facias, the court held that a capias ad satisfaciendum might issue before the return of the plaintiff could not possibly derive any advantage from the levy. The rule was therefore discharged with costs.

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If a judgment for the plaintiff be affirmed on a preceding writ of error

1. PRIMROSE v. GIBSON. M. T. 1822. K. B. 2 D. & R. 193.

Per Cur. The writs of fieri facias and capias ad satisfaciendum may run together. There is nothing irregular in suing both out at the same time against the goods and the person of a defendant.

2. STAMPEA v. HODSON. T. T. 1724. K. B. 8 Mod. Rep. 302.

The plaintiff having obtained a judgment in debt against the defendant, sued out a fieri facias, and likewise a capias ad satisfaciendum at the same time, and thereon the defendant was taken in execution. It was now moved to quash the fieri facias. The court were of opinion that the plaintiff might, for his own security, take out two writs but he could execute but one; the writ of fieri facias was consequently quashed.

3. WILSON v. KINGSTON. M. T. 1816. K. B. 2 Cit. Rep. 203.

A writ of fieri facias had been issued, and goods taken under it, and sold for a part of the debt. The return stated these facts, and also that certain property remained in the sheriff's hands unsold. A capias ad satisfaciendum for the remainder had been issued, the return to which recited the former fieri facias and return of levy of a part, and that the property above-mentioned had been sold for a sum of money less than the sum indorsed to be levied, but did not state any return by the sheriff as to what had been done with the property. The court, upon being applied to, made a rule absolute for setting aside the capias ad satisfaciendum, observing, that the above recital was not sufficient, it not being the formal return of the sheriff, and that until he had finally returned what had been done with the property, no capias ad satisfaciendum for the supposed residue could legally be issued.

4. MILLER v. PARNELL. M. T. 1815. C. P. 2 Marsh. 78; S. C. 6 Taunt. 370.

The plaintiff in this case having withdrawn an execution levied under a writ of fieri facias, returnable on the 6th of November, under an impression that the property would prove insufficient to satisfy his demand, sued out, on the 14th of August, a writ of capias ad satisfaciendum, and the defendant was taken in execution thereunder. A rule nisi was obtained to set aside the capias ad satisfaciendum, and discharge the defendant out of execution for irregularity, on the ground that the second writ could not issue till after the return of the first.

Per Cur. If a plaintiff omits to take out execution on a fieri facias, it is clear that he may sue out a capias ad satisfaciendum immediately, or that, if he sues out both writs at the same time, he may execute either but he cannot take both the goods and person, except for the residue of the debt, which deficiency can only be known from the return to the fieri facias. Having therefore actually executed the fieri facias, the plaintiff cannot issue a capias ad satisfaciendum till after the return.—Rule absolute.

5. EDMOND v. ROSS. H. T. 1821. Exch. 9 Price. 5.

A rule nisi was obtained in this case to set aside a writ of capias ad satisfaciendum, on the ground that a writ of fieri facias had been issued against the goods of the defendant, and had not been returned before the suing out the latter writ. Cause was shown on an affidavit of the sheriff's bailiff and his assistant, which stated, that at the time they entered for the purpose of levying under the fieri facias, the defendants goods were under the process of distress, and were insufficient to satisfy the landlord's claim. It was attempted, on the part of the defendant, to assimilate the case to that of Miller v. Parnell, ante, p. 36. But the court drew a material distinction between the cases, as the one cited was decided on the ground that the plaintiff ought not to have a double remedy against the goods and person; whereas, in the present instance, the plaintiff could not possibly derive any advantage from the levy. The rule was therefore discharged with costs.

6. MILLER v. BRADLEY. M. T. 1724. K. B. 8 Mod. Rep. 189.

This was a writ of error brought on a judgment in C. B.; judgment *non omittas capias ad satisfaciendum* into either; see Tidd 1045. But if the capias ad satisfaciendum be once executed, no writ of execution can be sued out by the plaintiff his goods or lands whilst he remains in custody for the same debt.

ing affirmed in the K. B. the last paper day of the term, it was insisted that the *capias ad satisfaciendum* should be returnable in the present term, because the judgment could not be signed till the fourth day afterwards, &c. and that the plaintiff having brought a *testatum capias ad satisfaciendum* it must be irregular, because there could be no *capias ad satisfaciendum* on a judgment not signed, and consequently nothing to ground a *testatum capias ad satisfaciendum*, especially as this action was brought by original. *Per Cur.* This is a judgment of the first day of the term, in which it was obtained by relation which is sufficient to ground a *capias ad satisfaciendum*, and consequently a *testatum capias ad satisfaciendum*; and there being no difference in this respect between an action by bill and by original, it is regular.

VIII. HOW FAR A TAKING UNDER IS DEEMED A SATISFACTION.*

1. VIGERS v. ALDRICH. M. T. 1769. K. B. 4 Burr. 2483

In an action of debt upon a judgment, it appeared by the plea, and was admitted by the replication, that the defendant's person had been taken in execution, by virtue of a *capias ad satisfaciendum*, upon the judgment, and afterwards discharged out of custody by consent of the plaintiff, upon his entering into an agreement "to pay certain sums of money at stipulated times," whereof he had accordingly paid to the plaintiff, pursuant to the agreement, but had failed in payment of the residue. The plaintiff, in his replication, acknowledged these facts, and yet concluded it with demanding the whole sum due upon the judgment. The defendant demurred to the plaintiff's replication. *Per Cur.* The defendant's person having been once taken in execution upon this judgment, and afterwards discharged by consent of the plaintiff, he cannot be liable to any further execution upon it; nor can the plaintiff bring an action of debt upon the judgment, which has been already so carried into execution, and the defendant so discharged from it; he ought to have brought an action upon the case, founded on this new agreement. The Court also held the replication to be repugnant, in demanding the whole sum, when it acknowledged it to be satisfied in part.—Judgment for the defendant.

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the last paper day of the term, a *testatum capias ad satisfaciendum* may issue on the last day; returnable on the first day of the ensuing term.
If a defendant be once in execution, and afterwards discharged by consent upon conditions which are not afterwards fulfilled;

2. JAMES V. WITHY. H. T. 1787. K. B. 1 T. R. 557.

A defendant having been taken in execution upon a judgment, to procure his discharge, gave the plaintiff a bond and warrant of attorney, which proving unproductive on account of an informality, the question was, whether the plaintiff could have any further execution against the defendant.

Per Cur. As the security was good at the time of the discharge, the defendant cannot have recourse to the judgment again, because that was waived; and the debt having been once extinguished, cannot be revived again. This is not a new question. The case of *Vigers and Aldrich*, *ante*, p. 37. goes the whole length of this; for here the defendant has neglected to avail himself of the advantage of the security. It was his own fault, and he must take the consequences. See 2 Bing. 41.

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Or upon giving a new security, which turns out unavail-
able;

3. BLACKBURN v. STUPART. H. T. 1802. K. B. 2 East. 243.

The defendant, who had been taken in execution on a judgment, and afterwards discharged by the plaintiff's consent upon an express undertaking, that he should be liable to be retaken if he failed to comply with the terms agreed

Even al-
though there be an understanding that he should be liable to be retaken.

* The taking a party in execution is, in general, deemed a satisfaction; see 4 T. R. 555; *Hob. 59*. Hence, a judgment creditor who has taken his debtor in execution, cannot afterwards sue out a commission of bankruptcy upon the same debt; *Cohen v. Cunningham*, 8 T. R. 123. abridged, *ante*, vol. iii. p. 550; nor set off the demand; *Hob. 59*. But a *capias ad satisfaciendum* is no actual satisfaction, so as to bar the plaintiff from taking out execution against other defendants liable to the same debt or damages; *Hob. 59*; see 5 Taunt. 614; 8 C. 1 Marsh. 250. And where a defendant, having been taken under an attachment for non-payment of money, pursuant to an award, was discharged by the sheriff, on his consenting to return into custody, the Court, on his refusal to do so, granted an *alias* attachment against him; *Good v. Wilks*, cited 2 Tidd. 1047. If a party, taken on a *capias ad satisfaciendum*, escape, though the sheriff be liable, the plaintiff may sue out a new execution; see 2 Bac. Ab. 240. 244. 355; and if the defendant escape from the King's Bench or Fleet prisons, the plaintiff, on application to a judge, may have an escape warrant to retake him; see 1 Ann. c. 6. *post. tit. Escape*.

on, now moved to set aside a subsequent execution which had been put in force in consequence of his failure in the performance of the above stipulation, and that the money which had been paid should be refunded by the sheriff. The Court, reprobating the defendant's conduct, said, that they regretted the rule must be made absolute, as it would be dangerous to permit the law to be unsettled, which was, that a person could not be taken in execution twice on the same judgment, whether the defendant had agreed to the enlargement, as in the case before them, or not.—Rule absolute.

See 7 T. R. 420; Barnes. 205. 210; Hob. 2.

So if a defendant be superseded for want of being charged in execution, he cannot be taken again upon the same judgment.

4. *LINE v. LOWE*. II. T. 1806. K. B. 7 East. 330; S. C. 3 Smith's Rep. 267. This was a rule to show cause why the defendant should not be discharged out of custody, upon a *capias ad satisfaciendum*, and why the writ should not be set aside, with costs, for irregularity, the defendant having been once in custody before, and superseded for want of being duly charged in execution upon the same judgment. The Court now discharged the rule with costs, upon condition that the defendant should not bring any action for the imprisonment, and observed, "having some doubt on the subject before us, and looking at the printed book of rules and orders in the Court of King's Bench, (Trinity, 2 Geo. 1.) there is a note in the margin, which lays down the practice on this subject, and we wished to see if it was warranted by authority. It states, if the defendant supersedes for want of proceedings before judgment, yet the plaintiff may afterwards take the defendant in execution; but otherwise if the party is superseded for want of charging in execution. And," upon searching: we find this is warranted by the authority of the cases of Clarke and Venner (Cases of Practice, C. B. 136.,) and Wright and Kenswell (ib. 135. and Barnes. 376. recognized in Comb. 72.) We are, therefore, of opinion, that the party cannot be taken in execution, having been once discharged for want of proceeding to execution. See 1 T. R. 273; Impey's Instr. Cler. K. B. 4th edit. p. 523; Ca. Temp. Hard. 244.

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So on a joint *capias ad satisfaciendum* against two if one be taken and discharged by the plaintiff the other is also exonerated.

5. *CLARKE v. CLEMENT*. H. T. 1796. K. B. 6 T. R. 525. A. B., one of two defendants, having been taken on a *capias ad satisfaciendum* against both, was discharged out of custody on an undertaking to render on a particular day, if the debt was not paid. On motion that the *capias ad satisfaciendum* might be quashed as to the other defendant, and satisfaction entered on the roll; the Court said, the release extends to both; for this being a joint execution, the plaintiff, by suffering defendant to be discharged out of execution cannot now take the other. But there is no reason why we should make this rule absolute to its full extent; it will satisfy the justice of the case if we order that the defendant shall not be taken on the writ, without directing it to be quashed.

So where two persons were taken in execution on a *capias ad satisfaciendum*, and one was discharged on giving a promissory note, it was holden to operate as a release of the other;

6. *BALLAM v. PRICE*. E. T. 1818. C. P. 2 B. Moore. 235. Two defendants having been arrested on a joint *capias ad satisfaciendum*, the plaintiff discharged one of them on receiving a promissory note for the amount of the damages and costs; the other defendant obtained a rule nisi for the discharge of himself also out of custody. It was urged for the plaintiff, that the defendant was not wholly released by the acceptance of the note, as he had engaged to render himself again if he did not honor it in time. But the Court held, that as the plaintiff had received satisfaction from one defendant, he could not require it again from the other.—Rule absolute.

7. *NADIN v. BATTIE AND ANOTHER*. E. T. 1804. K. B. 5 East. 147; S. C. 1 Smith. Rep. 362

One of two defendants taken on a joint *capias ad satisfaciendum* was discharged under an Insolvent Debtor's Act. The question which now arose was, whether such discharge operated in effect to liberate the other? The Court said, the law (which works detriment to no man, in consequence of having directed the discharge of one defendant,) cannot so far implicate the plaintiff's consent (which would of course have deprived him of all hold on either of the defendants) against the fact, as to operate as a discharge of the other. See Barnes. 196. 210; 1 T. R. 425.

of the other under an Insolvent Debtor's Act, unless the plaintiff actually consents.

8. By 1 Jac. 1. c. 13. s. 2. it is enacted, that "if any person arrested in execution is set at liberty, by privilege of either house of parliament, the party at whose suit such writ of execution was pursued, his executors or administrators, after such time as the privilege of that session of parliament in which such privilege shall be so granted shall cease, may sue forth and execute a new writ or writs of execution in such manner and form as by the law of this realm he or they might have done. if no such former execution had been taken forth or served."

By the 21 Jac. 1 c. 24., after reciting, that forasmuch as daily experience doth manifest that divers persons of sufficiency in real and personal estate, minding to deceive others of their just debts, for which they stood charged in execution, have obstinately and willingly chosen rather to live and die in prison, than to make any satisfaction according to their abilities; to prevent which deceit, and for the avoiding of such doubts and questions, it is enacted, that "the party or parties at whose suit, or to whom any person shall stand charged in execution for any debt or damages recovered, his or their executors or administrators may, after the death of the person so charged and dying in execution, lawfully sue forth and have new execution, against the lands and tenements, goods and chattels, or any of them, of the person so deceased, in such manner and form, to all intents and purposes, as he or they or any of them might have had, by the laws and statutes of this realm, if such person so deceased had never been taken or charged in execution."

"Provided that this act shall not extend to give liberty to any person or persons, their executors or administrators, at whose suit or suits any such party shall be and die in execution, to have or take any new execution against any lands, tenements, or hereditaments, of such party so dying in execution, which shall at any time after the said judgment or judgments be by him sold bona fide for the payment of any of his creditors, and the money which shall be paid for the lands so sold, either paid or secured to be paid to any of his creditors, with their privy and consent, in discharge of his or their due debts, or of some part thereof."

IX. WHEN SET ASIDE.†

If the *capias ad satisfaciendum* be in any respect irregular, or issued in contravention of any of the preceding rules, the defendant may move the Court to set it aside, and obtain his discharge from custody see 2 Tidd. 1049.

CAPIAS SPECIAL. See tits. *Original Writ*; *Proceedings by*.

CAPIAS UTLAGATUM. See tit. *Outlawry*.

CAPITUR IN WITHERMAN. See tit. *Distress*.

CAPITA. See tit. *Distribution*.

Capital Punishment.

See tits.	Abortion,	Mutiny,
	Arson,	Rape,
	Bastardy,	Riot,
	Burglary,	Stabing,
	Cattle,	Treason,
	Forgery,	Trees.
	Murder.	

CAPITULATION. See tits. *Insurance*; *Prize*.

CAPTION OF INDICTNENT. See tit. *Indictment*.

* At common law, if the plaintiff had taken the defendant in execution, he could not, afterwards, after the death of the defendant, have execution against his goods; &c.; see 1 Arch. Prac. 279.

† As the cases, and rules relating to an execution under an erroneous judgment, are applicable to other writs as well as a *capias ad satisfaciendum*, it will suffice to refer to the general head of Execution, *post*.

CARDS.

CAPTION OF A FINE. See tit. *Fine*.

CAPTIVES. See tit. *Prisoners of War*.

CAPTOR. See tits. *Insurance*; *Prize*.

CAPTURE. See tits. *Insurance*; *Prize*.

CARD.

The defendant's card is not admissible in evidence, unless the plaintiff give him notice to produce his cards, and prove that the one produced is an exact copy, or show that he received the identical card from the defendant himself; *Clark v. Capp*, 1 Carr. 199.

Cards. See tit. *Gaming*.

The 43 Geo. 3. c. 68. imposed on every dozen packs of playing cards, a duty of 2l. 8s.

By the 44 Geo. 3, c. 98., that duty was repealed, and a new duty charged, viz. upon every pack of playing cards for sale or use in Great Britain, 2s. 6d.

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CARGO. See tits. *Carrier*; *Charter-party*; *Freight*; *Insurance*.

CARNAL KNOWLEDGE OF INFANTS. See tit. *Rape*.

CARPENTER. See tits. *Bankrupt*; *Builder*.

CARICATURE. See tits. *Libel*; *Piracy*.

CARRIAGE. See tit. *Action, Driving*.

Carrier.

See tit. Bailment,
Charter-party,
Frauds, Statute of,
Freight,
Lading, Bills of,
Lien,
Post-Office and Postmas-
ter-General.

Ship and Shipping.
Stage-coachman,
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(A) BY ACTION.

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(BY INDICTMENT.

1st. By carriers, p. 186. 2d. Against carriers, p. 187.

I. OF CARRIERS BY LAND.

(A) OF CARRIERS OF PERSONS.

(a) As to the contract to carry. 1st. The passenger himself. 1. As to how and when it is created.

* The law of bailments in general has been already examined (*ante*, vol. iii. p. 357.) The decisions of the Courts, as applicable to that division of the work, were then abridged. The particular species of bailment now under consideration has become of the great test importance, and commanded more attention than any other, from our commercial prosperity, and the consequent rapid augmentation of the numbers of those who are daily incurring the responsibility of such bailment; and from the doubts and intricacies that have been occasioned by the combined effects of the struggles of the carriers themselves on the one hand, and the express interference and implied sanction of the legislature on the other,

A carrier's contract to convey passengers at a fixed rate of fare; and a carrier of persons is bound, upon a tender of the fare, to accept the individual as a passenger, provided he has room in his vehicle.

1. KER v. MOUNTAIN. T. T. 1793. N. P. 1 Esp. 27.

From this case it may be laid down, that if a person take a place in a stage-coach, and pay the fare at the time, the proprietor is bound to carry him to the place he was informed by him he intended to go, and to which he undertook to convey him.*

2. It would even appear from the cases which are abridged, *post*, p. 80. and which establish that a person who represents himself as a common carrier of goods, cannot refuse to convey them from his accustomed place of setting out to his usual place of destination, provided he has room in his coach or waggon; and also from the general principle recognised in all similar instances as the present; such as, for example, the case of an innkeeper or other victualer, who hangs out a sign, and opens his house for travellers; that there is an implied engagement on the part of carriers of persons not to refuse those who apply for seats by their conveyance, the privilege of travelling in such a manner, provided there is room for them, and a tender is made at the time for the fare demanded. But the case of Bretherton and Wood (3 B. & B. 54; S. C. 6 Moore. 141; and 9 Price. 408.) which is abridged, *post*, p. 162. is a clear authority in favour of what has been advanced, because, if the principle which exists in the case of carriers of goods be attended to, viz. that he is a public servant, and therefore responsible for a refusal to perform his duties, it will be clear that carriers of persons are in this respect equally bound to attend to the interests of the community, that case having established that in an action against stage-coach proprietors for an injury to a passenger, by a coachman upsetting the coach, the declaration may be framed *in tort* for a breach of duty by negligence of servants. The Court observed, if it were true that the present action were founded on a contract, so that to support it a contract between the parties to it must have been proved, the objection that is now made would deserve consideration. But we are of opinion that this action is not so founded. This action is on the case against common carriers, upon whom a duty is imposed by the custom of the realm, or in other words, by the common law, to carry and convey goods and passengers safely and securely, so that by their negligence or default no damage or injury may happen. A breach of this duty is a breach of the law; and for this breach, an action lies, founded on the common law, and which requires not the aid of a contract to support it.

Not only must the coach proprietors abstain from taking more than the legal number upon the coach, as otherwise a passenger may refuse to occupy his seat, and sue for expenses incurred;

2. Of its nature.

I. LONG v. HORNE. H. T. 1825. N. P. 1 Carrington & Payne's Rep. 612.

Evidence was adduced in this case, to show that a seat ought to have been retained by defendants, as proprietors of a stage-coach, for plaintiff's servants, outside; but that upon their coming to the coach, more than the number limited by the act of parliament, applicable to the species of conveyance of which the defendants were owners, had already got seated on the coach; upon which plaintiff ordered her servants not to travel with that number, and that the plaintiff and her family (who refused to go by the coach, for the reasons disclosed *infra*) and servants went by post-chaises, at an additional expence of 9*l*. Abbott, C. J. held, plaintiff entitled to recover the difference of the expence sustained.

2. LONG v. HORNE. H. T. 1825. N. P. 1 Carr. & Payne's Rep. 610.

But the contract entered

The declaration in this case stated a contract to carry the plaintiff, etc. *together* in opposition to the interests of the public at large to increase the various privileges that have been successively conferred, at different periods, upon carriers, in contradiction to the common law, or those customs handed down to us from our ancestors, and confirmed by the practice of their posterity. Care has been therefore taken to exhibit in as an enlarged, and at the same time succinct a manner, as possible, the several relations in which the parties stand to each other, and the rights and remedies which they respectively enjoy, and disabilities to which they are subjected, and the mode in which this species of bailment has been viewed in other countries.

* So where the owner of a post-chaise permits any one to get into it, and have his luggage fastened on, he cannot afterwards refuse to go the journey if the hire be tendered him; for it is such an inception of the contract, that he is bound to go through with it: *Messiter v. Cooper*, 4 Esp. 260.

her in a certain coach; and it appeared that she had applied to take the whole of the inside of the coach, and had booked four inside and two outside places. The question which now arose was, whether an offer to carry three in one part of a double-bodied coach (which is a coach, having a coach body to contain four persons, and an additional body like that of a chariot in front of it to contain two more,) and one in another part, was a failure of the contract. It was contended that the defendant had fulfilled his contract, as he had given the plaintiff four inside places, though in different parts of the carriage.

Sed per Abbott, C. J. If a party take inside places in a coach, saying they wish to travel together, I am clearly of opinion that you have no right to separate them.

3. Of its duration.

DUDLEY V. SMITH. H. T. 1808. N. P. 1 Camp. 167.

This was an action, in which the plaintiffs recovered against a coach proprietor, for the negligence of the driver, under the following circumstances. The plaintiff was carried safely as an outside passenger on the top of the coach to the inn where it stopped. When arrived before the gateway of the inn leading to the stable yard, the coachman requested plaintiff to alight there, as the passage into the yard was very awkward. She said as the road was dirty, she would be rather driven into the yard. He then advised her to stoop, and drove on. The consequence was, that she was struck violently on the shoulders and back by a low archway in the passage. It was proved from an admeasurement of the distance between the archway and top of the coach, that the interstice was only 12 inches. It was urged on the part of defendant, that upon the plaintiff's arrival at the gateway, the journey was completed; and that being then desired by the coachman to step down, if after that she chose to remain on the coach, and to ride into the yard, into which the defendant was not bound by his undertaking to carry her, his responsibility ceased, and that the plaintiff's only remedy, if any, was against the coachman. Lord Ellenborough said, the defendant was bound to carry the plaintiff from the usual place of taking up, to the usual place of putting down. This appears for the inside passengers to have been the yard. If the coachman had given the plaintiff the materials to judge, whether or not it would have been prudent, as an outside passenger, to have proceeded through the passage, the case would have been different; but he only told her the passage was awkward, whereas it was impracticable. Certain witnesses having, however, sworn that they had frequently ridden through the passage on the top of the coach, it was left to the jury to say, whether the coachman had sufficiently warned the plaintiff of her peril.—Verdict for plaintiff.

2d. The passenger's luggage.

Where a person holds himself out as the conveyer of persons and goods, it will be seen, *post*, p. 58. that he then comes under the designation of a common carrier as to all goods, whether they belong to a passenger or a stranger, and is, therefore entitled to the same privileges, and subjected to the same liabilities, as attach to those parties who undertake the charge of parcels and commodities, transmitted by a consignor to a consignee.

(b) Of their rights and privileges.

1st. To a reward. 1. When payable.

1. In a former division of this title, ante, p. 47, it was stated, that a carrier mandated at the time of application of persons cannot refuse to convey passengers from the point they profess to

* So where a servant of the coach proprietor entered into an agreement with a party for a seat, applying for an outside seat in his coach, from Liverpool to London, that he should ride by a coach inside during the night, provided there was room, it was holden that the coach proprietor or other public was liable for the guard's non-permission of such privilege; *Porter v. Horne*, K. B. T. T. 1826. MSS.

† *A fortiori*, the proprietors are bound to carry them to the place to which they profess their coach to go, and cannot refuse to proceed at any intermediate stage; and, in case of accident, they would be bound to provide another conveyance, for their undertaking is absolute. So, if there is a general usage to allow certain intervals for refreshment, they cannot vary, at their pleasure, those usages, which are, perhaps, a reason for preferring

The fare may be demanded at the time of application or other public conveyance;

set out, to their accustomed place of destination, *provided their fare be tendered*. Hence it follows, that they may demand their fare previously to the commencement of their journey.

And if not paid then, [50] the proprietor may fill up the party's place, if he is not at the inn when the coach sets off.

2. *KER v. MOUNTAIN*. T. T. 1793. N. P. 1 Esp. 27. Per Lord Kenyon. If a person take a place in a stage-coach, and pay at the time only a deposit, as half the fare for example, and is not at the inn ready to take his place when the coach is setting off, the proprietor of the coach is at liberty to fill up his place with another passenger; but, if, at the time of taking his place, he pay the whole of his fare, in such case the proprietor cannot dispose of his place; but he may take it any stage of the journey he thinks fit.

2. Of their lien. *Vide post*, tit. Lien.

(c) Of their liabilities. 1st. Of who are liable.

B. is liable for the seizure of a driver employed by A., with whom B. is a joint proprietor, though they have expressly agreed between themselves to provide horses and drivers for different portions of the road.*

WALAND v. ELKINS. E. T. 1816. N. P. 1 Stark. 272; S. C. Holt's case. 227. S. P. *HIARD v. BIGG*. Cor. Holroyd, J., Winchester Spring Ass. 1819. Manning's N. P. Index, 2d edition 320.

This was an action against the defendant, the proprietor of a waggon, for the negligence and misconduct of his servant, the driver, who had driven the waggon against a cart which stood in the public street, in K., and had forced the cart against the plaintiff's shop window, which was thereby broken. The waggon belonged to the defendant, but the horses were the property of another partner, of the name of Dyson. The business of a public carrier was divided between them; the defendant provided the waggon, and Dyson found the horses and drivers from L. to F.; but from F. to G., which was the conclusion of the journey, the defendant provided horses and drivers. He had, however, no actual controul over the waggoner at the time of the accident; on the contrary, Dyson hired him and paid him his wages. It was for the defendant submitted, that under these circumstances, the plaintiff could not recover. Gibbs C. J. said, I am of opinion that the action may be maintained upon this principle—the waggon belongs to Elkins, and he receives the profits derived from the use of it; on what terms he engages with Dyson we do not know; but being jointly entitled to the profits with Dyson, and since it is no objection that Dyson has not been joined, the case is the same as if Elkins had received all the profits; then since the waggon was to be drawn for the benefit of Elkins, the servant to all legal purposes was the servant of Elkins, although for inferior purposes, and as between the parties, he may be considered as the servant of Dyson. See 2 Taunt. 49.

[51]

Carriers of persons are not liable for unforeseen accidents or misfortunes.

2d. For what acts liable.† 1. General rule.

1. *CHRISTIE v. GRIGGS*. H. T. 1809. N. P. 2 Campb. 77. S. P. *ASTON v. HEAVEN*. H. T. 1797. N. P. 2 Esp. 533. S. P. *DEVEREUX v. ROYCE*. N. P. 1819. MSS. cited Manning's Index. 99.

their conveyance to the less convenient arrangement of other proprietors. But if a coachman refuse to wait, and actually leave a passenger behind, without good cause, it seems that the latter would have a remedy, either in withholding the remainder of the fare, or, if that has been all paid, by an action on the case for breach of the positive contract; viz. to convey the party to such a place at such a time; and might recover any further damage sustained by such misconduct.

* So in an action upon the case against three defendants proprietors of a stage coach, in which the declaration stated, that the defendants so carelessly managed their coach and horses, that the coach ran against the plaintiff, and broke his leg; and where it appeared in evidence, that one of the defendants was driving at the time when the accident happened, and the jury found that it happened through his negligent driving, the Court held, that the plaintiff might maintain case against all the proprietors, although he might, perhaps, have been entitled to bring trespass against the one that drove the coach; 4 B. & C. 223.

† It is almost superfluous to observe, that, under the subdivision of "Liabilities," might with propriety, be, classed those cases which have been previously abridged, respecting the coachowner's contract to carry safely. It is, however, so obvious, that actions might be maintained against those who infringe any of the particular contracts they may enter into as carriers of persons, or to which the law impliedly subjects them to an observance of, that the cases inserted in the text are confined to instances of negligence or accident, or wilful neglect, which render coach proprietors liable to the individual injured by such occurrences.

Per Cur. The undertaking of a carrier of persons differs from the contract of a carrier of goods. In the latter case nothing can operate as a discharge of the liability of the carrier excepting the act of God, or of the king's enemies, (*Vide post.*) In the former the carrier binds himself to carry safely those, whom he takes on his coach as far as human care and foresight will go.

2. HARRIS v. COSTER. H. T. 1825. N. P. 1 Carrington and Payne's Rep. 636. S. P. CROFTS v. WATERHOUSE. M. T. 1825. C. P. 3 Bing. 321.

But are merely bound to use due care.

Per Rest, C. J. A coach proprietor does not undertake to convey safely absolutely. He only binds himself to use due care..

3. DUDLEY v. SMITH. H. T. 1808. N. P. 1 Campb. 167.

The facts of this case are fully noticed, ante, p. 48. It will be here sufficient to observe that the question of whether the plaintiff had been injured in consequence of passing through a passage upon the top of defendant's coach, owing to the coachman's only having said to her that the passage was awkward, in which case it might be considered the defendant would be liable for his servant's negligence in not sufficiently warning plaintiff of the extent of the danger she incurred, or in consequence of her own imprudence, was left to the jury to decide; from which it is evident that if an omission of such a nature render a coach owner responsible, the general rule stated in the margin is correct.

They are, however, [52] responsible for the slightest degree of negligence,* which is a question for the jury.†

2. Particular Instances.

1. CHRISTIE v. GRIGGS. H. T. 1809. N. P. 2 Camb. 80.

This was an action against the proprietor of a stage coach for negligence, whereby the coach broke down, and the plaintiff, travelling by it as a passenger, was hurt. It was proved that the circumstance was occasioned by the fact of the axetree having snapped asunder at a place where there was a gentle declivity from the kennel crossing the road. The judge deeming such proof *prima facie* evidence of negligence, called upon the defendant to show that the damage arose from a mere accident; upon which the defendant proved that the axetree had been examined a few days before, and that the coachman was driving in a proper mode and manner. Whereupon the judge told the jury that if they were convinced that there had been no negligence in the driver, and that the coach had been sufficient as far as human eye could discover, the defendant could not be holden liable; and observed—there is a difference between a contract to carry goods, and a contract to carry passengers. For the goods the carrier is answerable at all events. But he does not warrant the safety of the passengers. His undertaking as to them, goes no further than this; that as far as ordinary wisdom and vigilance can go, he will provide for their safe conveyance. The jury found a verdict for defendant.

If, therefore, an accident occurred from the breaking of the axetree;

* And it will be sufficient to maintain such an allegation in the declaration, if the accident arose from any act of the driver, in itself unlawful or contrary to the acknowledged custom of the road, or from rashness or want of proper skill in driving; *vide supra*. This rule is consistent with the universal line of conduct pursued by the Courts in all cases where an injury accrues to individuals from accidents, and where no other prudential reason influences them, so as to induce them to narrow the limits within which the responsibility of parties ought to be preserved. It has, therefore, we have seen. (*ante*, vol. i. p. 109. *et seq.*) been holden, that a party is not liable for an inevitable accident, or an involuntary trespass, 4 Bur. 2098; or where chattels are inevitably driven against each other by the violence of the wind and rolling of the sea, 2 Chit. Rep. 639; or an injury is occasioned by the want of ordinary care, 11 East. 60; or skill. 2 Taunt. 314. on the part of the plaintiff. But any the least blame on the part of the defendant will, in all cases, deprive him of the protection of the preceding rule; 1 Bing. 213. The distinction that will be noticed hereafter as to the liability of carriers of goods by land, and with reference to their being chargeable for less than ordinary vigilance, does not hold in the case of carriers of persons; that regulation being for the prevention of fraud or collusion, which the former might be tempted, from the facilities afforded by their situation, to commit.

† But if the driver, with or without the knowledge of the owners, take up more passengers than are allowed by the act of parliament, and an injury ensue, which is laid in the declaration as having arisen from such overloading, the proof of there having been an excess of number, beyond what is allowed, will be conclusive evidence that the accident arose from that cause; 4 Esp. 259; *post*, p. 53.

Or from the horses taking fright,* and no fault be imputable to the driver, an action cannot be supported by a passenger for any damage received;†

[53] But the carriage itself.

And horse-trappings must be shown to have been inadequate for the journey; and if in consequence of the coach proprietors making default in these particulars, a passenger be placed in so perilous a situation as to render it prudent for him to leap from the coach whereby he is injured, the proprietor is liable in damages.

And where an accident is occasioned by the overturning of the coach, in consequence of the axle-tree making broken. It was, during the trial, stated to have been laid down by Lord Kenyon, that if the owners of the coach take up more passengers than are allowed by the act of parliament, and an injury ensue, which is laid in the

2. ASTON v. HEAVEN H. T. 1797. N. P. 2 Esp. 533.

In an action against the proprietors of a stage coach, for negligence, whereby the coach was overset; and plaintiff injured, the defence was, that on the side of the road was a pump of considerable height, from whence the water was falling into a tub below, that the reflection of the sun on the water caused the horses to take fright, who ran against the bank at the opposite side, which occasioned the accident. Per Eyre, C. J. No negligence appearing, and the accident seemed to have arisen from an unforeseen cause or misfortune, which the fact of the horses suddenly taken freight must be holden to be, the defendant is not liable. But it is for the jury to say, whether the accident proceeded from negligence or not.—Verdict for defendant.

3. BREMNER v. WILLIAMS. T. T. 1824. N. P. 1 Carrington and Payne's Rep. 144. S. P. CROFTS v. WATERHOUSE. M. T. 1825. C. P. 3 Bing. 321.

Per Best, C. J. Every coach proprietor impliedly stipulates that his coach shall be sufficiently secure to perform the journeys he undertakes; and he ought to examine its sufficiency previous to each journey; and if he does not, and by the insecurity of the coach a passenger is injured, an action is maintainable against the coach proprietor for negligence, though the coach may have been examined previous to the second journey before the accident, and though it had been repaired at the coachmaker's only three or four days before.

4. JONES v. BOYCE. M. T. 1816. N. P. 1 Starkie. 493. S. P. CROFTS v. WATERHOUSE. M. T. 1825. C. P. 3 Bing. 321.

The defendant was a coach proprietor; plaintiff was an outside passenger. During the journey the coupling rein, (to prove which defective evidence was adduced,) broke, in consequence of which one of the leaders became unmanageable, and the coachman was obliged, whilst the coach was on a descent, to draw to one side of the road, where the vehicle came in contact with some piles one of which it broke, but the coach was not overturned, and the wheel was afterwards stopped by a post. Alarmed at the occurrence, plaintiff jumped off the coach, whereby his leg was broken. Considerable evidence was brought forward to show that the plaintiff need not have jumped off; but the witnesses for the plaintiff stated, that the wheel was forced against the post with great violence, and that one of the wheels was elevated 18 or 20 inches; and one of the witnesses said, "I should have followed the plaintiff's example had I been in his situation, as the best means of avoiding the danger." Lord Ellenborough in his address to the jury, said—two questions are for your consideration; 1st, Whether the rein was defective; and if you should be of opinion that it was, 2dly, Whether that circumstance created a necessity for what the plaintiff did; and whether he had used proper caution and prudence in extricating himself from the apparently impending peril. If you are of that opinion, then since the original fault was in the proprietor, he is liable to the plaintiff for the injury which his misconduct has occasioned. On the other hand if the plaintiff's act resulted from a rash apprehension of danger, which did not exist, and the injury which he sustained is to be attributed to impetuosity and imprudence, he is not entitled to recover. The jury found a verdict for the plaintiff.

5. ISRAEL v. CLARK. H. T. 1803. N. P. 4 Esp. 259.

Action on the case against the proprietor of the Gosport coach, for an injury occasioned by the overturning of the coach, in consequence of the axle-tree making broken. It was, during the trial, stated to have been laid down by Lord Kenyon, that if the owners of the coach take up more passengers than are allowed by the act of parliament, and an injury ensue, which is laid in the

* Or from the lights attached to the coach by night being obscured by fog; per Best, O J. 3 Bing. 321.

† So if the coachman be deceived by a sudden alteration in objects near the road, by which he had used to be directed on former journeys, unless negligence be established, 3 Bing. 3.

‡ So the coachman must have competent skill, and must use that skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses, &c. and also with lights by night, 3 Bing. 321.

declaration as having arisen from such overloading, the excess above the number should be deemed conclusive evidence of the accident having arisen from that cause. Lord Ellenborough assenting to this, the defendant's counsel endeavored to prove that no more passengers were on the roof at the time than were allowed by act of parliament, upon which his lordship said—the penalty in case of a coach proprietor carrying more than the number specified in the statute, arises from an infringement of the statute; the damages in the present case attach upon the breach of the implied contract, that the defendant would provide a safe and adequate carriage for the number he takes up.—Verdict for plaintiff.

6. ASTON V. HEAVEN. H. T. 1793. N. P. 2 Esp. 533.

In an action against a coach proprietor to recover damages for an accident, Eyre, C. J. said—It appears by the evidence that a person was on the roof; that undoubtedly alters the centre of gravity, and makes the carriage more liable to be upset; and if the construction of the carriage was such, that by putting a person on the roof it renders it unsafe, I think in such case the owners would be liable; but that is not to be presumed to be so without evidence.

7. HEARD AND WIFE V. MOUNTAIN AND ANOTHER. Feb. 26, 1826. K. B. MS.

This was an action to recover compensation in damages for the injury sustained by the plaintiff's wife being thrown from the defendant's coach, through the neglect and misconduct of the defendant's servants. From the evidence of three other outside passengers, it appeared that the plaintiff's wife was a passenger with them on the defendant's coach, which ran from Exeter to London. On leaving Exeter, the coach was very heavily loaded with luggage in the boots, and also on the roof, so much so, as to be inconvenient to the passengers. In passing down Harnam-hill, near Salisbury, the drag chain being broken, and one of the horses becoming unruly, the coach was drawn into the water table by the road-side, and some one exclaiming "she is going over," several of the passengers jumped off, and from the slanting position of the coach, the plaintiff's wife was thrown into the road, and the wheels passed over one of her ankles. She was taken up and removed to Salisbury. The surgeon who attended her till she left Salisbury, proved his finding her in a very dangerous state, her foot being in a state of mortification from the ankle downwards, and several of her front teeth knocked out, and that she would never wholly recover from the injuries sustained by the accident. Another surgeon who had attended her since her arrival in London, corroborated the statement of the former surgeon, and said, she would never have the entire use of her foot again; and the muscles of the jaw being elongated, she could not, without much inconvenience, masticate her food. The counsel on the opposite side here stated, he was happy to inform the jury that he had arranged between the parties; the proprietors had no disposition to throw obstacles in the plaintiff's way, although they had been instructed there was a good defence to this action; but they had paid the plaintiff's expences at Salisbury, and were now willing that a verdict should be taken for the plaintiff for 150*l.* provided no other action was brought.—Verdict for the plaintiff accordingly, damages 150*l.*

8. ASTON V. HEAVEN. H. T. 1793. N. P. 2. Esp. 533.

Per Eyre, C. J. If a driver of a stage coach drive with reins so loose that he cannot readily command his horses, the proprietors are liable, for the driver is answerable for the smallest negligence.

9. DUDLEY V. SMITH. M. T. 1808. N. P. 1 Campb. 167.

In this case the jury found a verdict for the plaintiff, who was an outside traveller by defendant's coach, the driver of which it appeared to them had not exercised sufficient caution in warning plaintiff of the nature of a passage through which the coach had to pass, and of the contiguity of the roof of such passage and the coach when it passed through, which fact must have been known to him. See this case more fully abridged, ante, p. 48.

10. WORDSWORTH V. WILLAN. M. T. 1805. N. P. 4 Esp. 273.

Case against defendants, proprietors of a coach, for the negligence of their

ter number of passen-
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or construc-
tion will al-
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bear, it is
no excuse
that the
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does not ex-
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lowance.

So if the
equilibrium
of the
coach be af-
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Or luggage
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the roof;

Or if the
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hand that
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[55]
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to warn them of the full extent of the danger. And if he go so close to the side of the road, that for want of sufficient room an accident occur, his principal is liable. But there is no rule that a coach must always be kept on the left, or proper side of the road; and if an injury occurs which might have been avoided had [56] the coach been on its own side of the road; still a suit cannot be instituted if it arose from mistake. And on the other hand it will afford no defence, that the driver kept to his own side of the road.

servant in driving so near the path on the wrong side of the road, that the plaintiff's horse becoming frightened, and plunging, came in contact with the coach and broke his leg; and it was said by Rooke, J. it cannot be laid down as a certain rule, nor does public convenience require that the driver is under all circumstances bound to keep on the left, or what is considered the proper side of the road. If there was no interruption of any other carriage, or the road was better, public convenience did not require that the driver should adhere to that law of the road. He took the rule of law to be, that if a carriage coming in any direction left sufficient room for any other carriage, horse, or passenger, on its proper side of the way, it was sufficient; but that it was evidence for the jury if the accident arose from want of that sufficient room; the driver was not to make experiments.

11. *ASTON V. HEAVEN*. H. T. 1793. N. P. 2 Esp. 533.

This was an action on the case, against the proprietors of a coach, for negligence. It appeared in evidence that the accident arose from the horses having taken fright, but that no fault was imputable to the driver. It was held that the owners were not liable in damages to the plaintiff, although it was proved that the carriage was driving in the middle of the road, whereas had he been driving on the left side (which it was contended, the driver was by law bound to do) the accident might not have happened, on account of the great distance from that side where the bank was which occasioned the accident, Eyre, C. J. observing that when there is no other carriage to interrupt the driver, he may go on what part of the road he thinks fit.

12. *MAYHEW V. BOYER*. M. T. 1816. N. P. 1 Stark. 423.

The plaintiff was a passenger by a coach which was overturned in consequence of its coming in contact with the vehicle of the defendant, under the following circumstances. The coaches were both directed to the same place. The driver of the latter, (during night,) attempted to pass the other coach at the top of a hill, and just as it was about to turn an angle in the road to the left. It was, however, contended on the part of the defendant, that at that period his coach had sufficient room left to pass that on which the plaintiff was travelling, there being a space of 17 feet wide to the right of the latter; and that the accident would not have occurred had it not been occasioned by the fact of the leading horses attached to the latter having been driven in an oblique direction from the left to the right side of the road. But it appearing that the situation of the coach, by which the plaintiff was a passenger, had been seen some time before the defendant's coach came up, and that the driver of the latter might, by having driven nearer to the right side than he did, have effectually guarded against the mischief. Lord Ellenborough said; this is decisive of the case; if it be practicable to pursue a course which is safe, and you follow so closely upon the track of another that mischief may ensue, you are bound to adopt the safe course. The coach on which the plaintiff was seated had at the time the whole free range of the road, and the driver had a right to occupy any part of it unless he was aware of the proximity of the defendant's coach. This accident occurred in the night time. Risk might consequently have been doubly apprehended. The driver of the coach belonging to defendant ought therefore to have calculated upon the exercise of the other's right to traverse the whole space of the road, and have kept nearer the right side than he did, by which means this suit might never have been instituted.—Verdict for plaintiff.

13. *JACKSON V. TOLLETT*. H. T. 1817. N. P. 2 Stark. 37.

The facts of this case were these. The defendant was the driver of a stage coach; as it was one day proceeding up a hill, it was met by a wagon, which was nearly in the middle of the road, which was thirty feet wide.

* There are three customary rules or directions for driving; 1st, That in meeting each party shall bear to the left; 2d, that in passing, the foremost person bearing to the left, the other shall pass on the off-side. But the driver of a carriage is not bound, under all circumstances, to pass another carriage on the off-side. He may, if the street be very broad, go on the near side. 3d. That in crossing, the driver should bear to the left hand, and pass behind the other carriage. MSS. S. C. 2 D. & R. 63.

Another stage coach was coming down the hill behind the wagon, at a quick pace. The defendant's coachman to avoid any danger, drew to the left, although warned not to do so, by means of which the coach came in contact with some hillocks of dirt, which being hardened by the frost, did not yield to the pressure of the wheel, and was overturned. The plaintiff was a passenger, and had his leg broken. Lord Ellenborough, in his address to the jury said: the defendant was bound to use the best and soundest judgment under the circumstances disclosed to you; now it is said that the coachman had this election, whether he should risk drawing near the hillocks of dirt, or meet the coach which was rapidly descending behind the wagon. But that is not the case for your consideration. The question you have to consider is this; whether the coachman might not have adopted a third more safe and innocent course by stopping, instead of incurring the risk of approaching a hillock which he was called to avoid as dangerous, and which he must, or ought to have known to have been a hard and solid mass from the state of the weather. If he exercised a prudent discretion you must give your verdict for defendant. But if you think that, although he might have incurred some danger in stopping, such conduct would have been what he ought to have adopted as proceeding from greater care and skill, then you must find for the plaintiff.—Verdict for plaintiff.

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(d) Of their disabilities

Ex parte MIDDLETON. T. T. 1824. K. B. 3 B. & C. 164; S. C. 4 D. & R. 824.

It was in this case contended, that the driver of a stage coach was not within the 3 Car. 1 c. 4. which imposes a penalty upon carriers travelling on a Sunday, inasmuch as the statute could only apply to such conveyances as were in use at the time of passing the act. The Court declined deciding the point, as it was not immediately before them.

Query, whether the owner of a stage coach is subjected to the penalties created by the 3 Car. 1. c. 4. for travelling on a Sunday.

(B) OF COMMON CARRIERS OF GOODS.

(a) Who are or are not such common carriers.

1st. General rule.

1. GIBBOURN v. HIRST. H. T. 1709. K. B. 1 Salk. 249. S. P. COGGS v. BERNARD. 1702. K. B. 2 Ld. Raym. 918; S. C. 1 Com. 133; 1 Salk. 26; 3 id. 11; Holt. 1; 3 Ld. Raym. 163.

Trover for goods (taken as a distress) which had been put, with a waggon into a barn. The person to whom they had been intrusted was not a common carrier, but carried cheese to London, and usually loaded back with goods, for a reasonable price, for all persons indifferently. And the Court held, that such an undertaking to carry for hire, as to this privilege, was to be considered that of a common carrier; and the goods so delivered for that time, under a legal protection and privilege, from a distress for rent; which, they observed, was only consistent with the general rule of law, applicable to the right of distress connected with property delivered to a person exercising any public trade or employment.* See Cro. Jac. 262. 3 Taunt. 272; Rol. Ab. 2; 4 Co. 84; Bac. Abr. tit. Carriers, A.

Any person undertaking for hire to carry the goods of all persons indifferently, is, as to the liability imposed, to be considered a common carrier.

2. BASTARD v. BASTARD. M. T. 1679. K. B. 2 Show. 81. S. P. LOVETT v. HOBBS. T. T. 1680. K. B. 2 Show. 129. S. P. ROGERS v. HEAD. M. T. 8 Jac. 1 K. B. Cro. Jac. 262. S. P. NICHOLLS v. NURE. E. T. 1661. K. B. 1 Sid. 36. S. P. MORSE v. SLUE. H. T. 1671. K. B. 1 Vent. 190; S. C. 1 Mod. 85; 2 Lev. 69.

And no special agreement for the amount

Case against defendant, as a common carrier, for loss of a box. Upon motion in arrest of judgment, because no particular sum had been agreed upon for the carriage, but only that a reasonable reward was to be paid, the Court refused to interfere; for, perhaps, there was no particular agreement, and then the carrier might have a quantum meruit for his hire; and he was therefore equally amenable for the loss of the goods in the one case as the other.

the amount of the hire is essential to constitute this relation;

3. ANSELL v. WATERHOUSE. T. T. 1817. K. B. 2 Chit. Rep. 1.

* As to the general doctrine of distresses in this respect, see 8 Bur. 1498; 1 Bl. 488; Cro. Eliz. 596; et post, tit. Distress.

A common carrier's obligation being founded more upon a public duty than the particular consideration for his undertaking. This was an action on the case against a common carrier, for not safely carrying a passenger. Defendant pleaded in abatement the non-joinder of a co-proprietor, which, it was contended on demurrer, was proper; as it was clear, that if the declaration had been framed in *assumpsit*, which, it was urged, that it should have been the case, as this declaration was not framed on the custom of the realm, and contained no averment that the defendant was a common carrier; the defendant's plea would have been available; and, therefore, that the plaintiff could not, by changing the form of action, take away a ground of defence that would otherwise subsist. *Per Cur.* This action is founded on what is quite collateral to the contract, if any. This is an action against a person who, by ancient law, held, as it were, a public office, and was bound to the public. A duty, therefore, attaches upon him, which distinguishes the cases which have been cited from the one before the Court. Plaintiff had, consequently, his election to declare either for a *tort* or in *assumpsit*; so that we must give judgment for the plaintiff.—*Respondent Ouster.*

If, therefore, the proprietor of a stage-coach hold himself out to the world as a conveyer of persons and goods from one place to another, he is a common carrier; but with respect to a passenger's luggage, he is entitled to the same privileges in the one case as in the other, such as the advantage derived from a public notice, &c.

And there is no distinction between mails and other coaches in this respect.

And although it was formerly supposed that a coach-proprietor did not incur the responsibility of a common carrier of goods unless he made a distinct charge

It would seem that a different rule now exists.

See 2 N. R. 366. 3 East. 70; 3 Wils. 319; 12 East. 89; 2 N. R. 454; 8 T. R. 335; 6 id. 369. 695; Sel. N. P. 6th edit. 412. 416.

2d. Coaches, proprietors of.

1. CLARK V. GRAY. E. T. 1802. N. P. 4 Esp. 177; S. C. 6 East. 564. S. S. LOVETT V. HOBBS. T. T. 1680. K. B. 2 Show. 127. S. P. HUTTON V. BOLTON. cited 1 H. Bl. 299.

In this case, which was an action against the proprietor of a stage-coach, to recover the value of certain luggage taken by the plaintiff when he took his seat in the said vehicle, the defence set up was, that a notice had been given by defendant limiting his responsibility. The plaintiff contended, that such notice only restrained defendant's liability as to goods sent to be carried, and not as to a passenger's luggage. But Lord Ellenborough said, that it had been decided, that the luggage of passengers came within the exception.

gance, he is entitled to the same privileges in the one case as in the other, such as the advantage derived from a public notice, &c.

2. WHITE V. BOLTON. T. T. 1791. N. P. Peake. 113. S. P. HARRIS V. COSTER. N. P. 1 Carr and Payne's Rep. 636.

Lord Kenyon said, that whatever doubts might have arisen as to the liability of the postmaster-general for letters, yet, when these coaches carry passengers, the proprietors of them are bound to carry them safely and properly.

3. MIDDLETON V. FOWLER. M. T. 1698. N. P. 1 Salk. 282; S. C. Skin. 625; Holt. 130. S. P. LOVETT V. HOBBS. 2 Show. 227. S. P. UPSHARE V. AIDIE. H. T. 1696. K. B. 2 Comyn. 24; Skin. 625.

Action upon the case against the master of a stage-coach. From the declaration it appeared, that plaintiff took a place in the coach, and that the defendant, by his negligence, lost a trunk of the plaintiff's. The evidence established that this trunk was delivered to the person who drove the coach, and that he promised to take care of it, and that the trunk was lost out of the coachman's possession. *Per Holt, C. J.* This action does not lie against the master. A stage-coach is not within the custom, as a carrier is, unless he takes a distinct price for the carriage of goods as well as persons; and though money may be given to the driver, yet that is a gratuity, and cannot bring the master within the custom.—Plaintiff nonsuited. See Rep. Temp. Hard. 282; Com. Dig. 212. 213; 1 Bac. Ab. 343; Vin. Abr. tit. Actions, C. 2. pl. 5.

made a distinct charge for the carriage of the goods as well as the passengers; and that a gratuity to the driver could not bring the master within the custom;

4. ROBINSON V. DUNMORE. E. T. 1602. C. P. 2 B. & P. 419. S. P. CLARK V. GRAY. E. T. 1802. N. P. 4 Esp. 177; S. C. 6 East. 564.

Per Chambre, J. It has been determined, that if a man travel in a stage-coach, and take his portmanteau with him, though he has his eye on the portmanteau, yet the carrier is not absolved from his responsibility, but will be liable if the portmanteau is lost.* See 22 H. 6. 20; 11 H. 4. 25; 42 Ed. 3. 11; 8 Co. 33.

* It does not appear from these observations of Mr. Justice Chambre, or from the facts

5. LOVETT v. HOBBS. T. T. 1680. N. P. 2 Show. 127.

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Per Jones, J. Where a coachman commonly carries goods, and takes money for so doing, he will be in the same case with a common carrier, and is a carrier for that purpose, whether the goods are a passenger's or a stranger's.

And even the case of Lovett v. Hobbs it self, which has been relied on, is of an ambiguous nature.

6. UPSHARE v. AIDIE. H. T. 1696. K. B. 1 Comyn. 24.

The question of a hackney coachman's liability for the loss of goods belonging to the plaintiff, who had taken the hackney coach, and delivered his goods to the coachman to be carried with him, being agitated, Holt, C. J. said—a passenger shall not charge a hackney coachman for goods which he carries with him, if he does not give him any thing for the carriage of them; but if he pays for the carriage, then he may charge the carrier. In the present case there was no express contract for the carriage.

The rule originally applicable to [61]

3d. Waggons, owners of.

GISBOURN v. HIRST. H. T. 1709. K. B. 1 Salk. 249.

the owners of coaches, is not, however, altogether as affects hackney coachmen,

A. B. brought goods to London on his private account; and on his return to the country, took such goods as he could get to carry back in his waggon to the country for a reasonable price. The Court held, that the value of the plaintiff's goods, which had been distrained from rent due by A. B. to the defendant, might be recovered in an action of trover; observing, that A. B. was a common carrier, and that it was a general rule, that goods delivered to any person exercising a public trade or employment, to be carried, wrought, or managed in the way of his trade or employ, were for that purpose under a legal protection, and privileged from distress for rent.

The proprietors of stage-waggons, have been at all times considered common carriers.

of the case disclosed in the report of *Clark v. Gray* (*ante*, p. 58,) that either in the one case or in the other, any distinct charge was made for the carriage of the party's luggage by the coach; and yet, in both instances, the Court treated the owners as common carriers. Besides, upon principle, the position which has been laid down in earlier authorities, cannot be supported; as *hire* is not the only and principal ground on which the carrier is liable, the great cause of the laws charging him being the *public employment* he exercises. But even allowing the force and cogency of the reasoning, upon the faith of which such decisions have been pronounced, yet, as a distinct price is now usually made for carriage of goods, and an additional charge is imposed upon all passengers for their luggage above a certain weight, it being presumed, that up to a certain weight, the coachmaster, like an innkeeper (*vide post*, tit. Innkeeper,) includes, in his fare, his charge for such responsibility, the same principles of public policy which invest him with the character and responsibility of a common carrier, when he charges a distinct price for the carriage of goods, would appear to require a similar rule when no such charge is made, but the goods are received as accompanying the passenger; see 8 Rep. 38; Noy's Maxims. 92; Bythewood's Edition; Dyer, 158. b. 266; Doct. & Stu. 288, 289; F. N. B. 94. 95; 2 Roll. 58; Yelv. 68; 4 M. & S. 306; Flow. Com. 9. 1; Co. Litt. a. note 6 & 7; Ld. Raym. 917; 1 Salk. 143; 12 Mod. 487; 1 Vin. Abr. 269. It may not be, however, irrelevant to advert to the view that has been taken of this subject by some of our elementary writers, as their observations may, perhaps, seem to militate against what is stated in the text to be the existing law. Mr. Jeremy, in his *Treatise on the Law of Carriers*, p. 12. makes use of the following observations: "It does not appear that the direct rule laid down in the first of the above cases (meaning 1 Salk. 282,) nor the conclusion to be drawn in favor of the owner in the latter (meaning 2 Show. 127,) have been overruled by any modern decision on the subject; although Mr. Selwyn, in his *Nisi Prius*, p. 358. (last edit. p. 303-4.) seems to consider the case of *Clarke v. Gray*, (*supra* 58.) and what was said by Chamber, J., in *Robinson v. Dunmore*, (*supra* 59.) as making coach-owners, in general, liable as carriers. But it may, perhaps, be doubted, whether these cases go to such a length; such a conclusion can only arise from inference, and those cases were in fact decided on very different points, although the declarations were in form on the custom, a circumstance which may have arisen from the owners having really brought themselves within the custom, in either of the ways mentioned in the text, (meaning that the owners either took money indiscriminately for carrying goods, or that they made a custom of charging for overweight.) Heavy luggage is generally refused, on the ground that the carriages provided are intended for other purposes; and that allowing luggage at all is more for the accommodation of the passengers than a direct object of profit to the owners. In mails it is always refused, and it is, no doubt, competent for any other proprietor of a coach to devote it exclusively to the carriage of passengers, *quare igitur*. Where however, the carriage of heavy goods, luggage, &c. is regularly allowed and charged for, and parcels in general carried for hire, the proprietors are certainly to be considered common carriers." Now, if the foregoing observations be scrupulously examined, it will be found, that Mr. Selwyn's view of the law is borne out by reason and policy; and that, as has been already shown in the previous part of this note, the cases of *Middleton v. Fowler*;

The post masters and deputy postmasters are not liable as common carriers.†

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4th. Officers belonging to the Post Office.*

1. LANE V. COTTON AND ANOTHER. E. T. 1701. K. B. 1 Salk. 17; S. C. 1 Ld. Raym. 664;† S. C. 5 Mod. 455; S. C. 12 Mod. 482; S. C. Carth. 437; Holt. 562. Com. 100.

Sir Robert Cotton and Sir Thomas Frankland were constituted postmasters general by letters patent, according to the statute 12 Car. 2. c. 35. for erecting the Post Office, and in the letters patent there was a power to make deputies, and appoint servants, at their will and pleasure, and to take security of them in the name and to the use of the king; and also that the defendants should obey such orders as from time to time should come from the king; and as to the revenue should obey the orders of the Treasury. Farther the king and *Levett v. Hobbs*, cannot be now viewed as authorities illustrative of the same broad proposition as they were, at the time, the judgments in those cases were pronounced. Besides, Mr. Jeremy, in order to impugn their tenability, has himself recourse to an inference far less supported by probability than what he states is assumed by Mr. Selwyn, for he has recourse to an inference unauthorised by the report; whereas Mr. Selwyn does not engraft upon the original record any new facts, but only draws his conclusions from principle. It is also worthy of observation that in the latter part of the above remarks Mr. Jeremy has alluded to the fact of heavy luggage being in general refused to be carried on coaches and mails, and from that he seems inclined to infer, that when the proprietors of such coaches take luggage at all, it is done as a mere accommodation; that it is in their option to carry such property; and that they cannot, therefore, be viewed as common carriers in such instances. But it is a well known fact, that owners of mails and stage coaches hold out to the world that they will carry a passenger's luggage up to a certain weight, and that a light and small package may be even taken by a passenger by the mail; and then comes the question; whether the owner of a mail, or coach, professing to be a conveyer of persons with a small quantity of luggage, is not liable, in case of such luggage being lost, even through chance and accident, although no distinct charge was made for the fare of the passenger and the carriage of his luggage, it being the custom of such mail and coach-owners to carry parcels and commodities suited to their respective purposes, at specific rates. This note has been carried to this length, from the importance of the question and the peculiar features which it embodies, as ascertaining the exact liabilities and situation of coach proprietors. It may be remarked, that, as no doubt can exist as to the liability of mail and stage coach proprietors as respects the goods of a stranger sent to be carried for hire, they will, in all such instances, be viewed as common carriers

* See *post*, *tit.* Post-Office and Postmasters-General.

† At the end of the report of this case by Lord Raymond, the following observations are inserted—"And for these reasons judgment was given for the defendants. But, however, the plaintiff intending to bring a writ of error upon the said judgment, the defendants seeing that, paid the money to the plaintiff, as I was informed." In the argument, however, in the subsequent case of *Whitfield v. Lord Le Despenser*, (*supra*, p. 62,) the counsel for the defendant said, "As to the note at the end of Lord Raymond's report, signifying, that upon a writ of error brought, the Post-Office had paid the money, it would be totally immaterial, if true, unless done upon proper and legal advice; but the fact is, that no trace of any such payment can be found in the Post-Office, or of any such writ of error being brought—(search was made at Lord Mansfield's request,)—and therefore the conclusion is, that the information given to lord Raymond was not well founded; and it is observable that no other reporter takes any notice of it. For these reasons it is submitted, that the action did not lie." To which the counsel for the plaintiff replied,— "With respect to the case of *Lane v. Cotton*, it is said, no notice is taken by any reporter, except Lord Raymond, of the final issue of that case; but Peere Williams, in a note, vol. iii. p. 894, confirms the account given by Lord Raymond." The counsel farther said—"The authority which weighed most with him was the information he had received from Sir Thomas Parker, who had authorised him to say, that, being in the early part of his life very intimately acquainted with Lord Chief Justice Willes, who married a niece of the plaintiff Lane, the Chief Justice told Sir Thomas, that Lane had informed him the money was paid."

‡ Sir William Jones, in his elegant and systematic Essay on the Law of Bailments, does not seem to coincide with the propriety of the decision in this case; for he says—"Since neither the *element* on which the goods are carried, nor the *magnitude* and *form* of the carriage make any difference in the responsibility of the bailor, one would hardly have conceived that a diversity could have been taken between a *letter* and any other thing. Our common law, indeed, was acquainted with no such diversity; and a private postmaster was precisely in the situation of another carrier; but the statute of Charles 2. having established a General Post-Office, and taken away the liberty of sending letters by a private post; (12 Charles 2. ch. 35.) it was thought, that an alteration was made in the obligation of the postmaster-general; and in the case of *Lane v. Cotton*, three judges determined against the fixed and well supported opinion of Chief Justice Holt, "that the

granted to them, that they should not be chargeable for their officers, but only for their own voluntary default or misbehaviour, and this was granted with a fee of 1500*l.* per annum. The plaintiff's servant having exchequer bills, inclosed them in a letter, directed to one A. B. at Worcester, and delivered it at the Post Office at London, into the hands of one C. D., who was appointed by the defendants to receive the letters, and had a salary. The letter was opened in the office by a person unknown, and the exchequer bills taken away; and for this an action on the case was brought against the defendants.

Turton, Gould and Powis (*dissentiente* Holt, C. J.) held the action could not be maintained,—1st, because the office was created for intelligence, and not for insurance; for promotion of trade in procuring speedy dispatches, and not an absolute security for the dispatches themselves,—and, 2dly, because the offending party was himself a substantial officer, and liable for his own acts; and because, from the very nature of letters being in themselves missive and transient from hand to hand, are impossible to be secured by the postmaster himself; and that the act styling it only a *letter-office*, could not intend it to be considered as a mode of conveyance for *treasure*.*

See Hard. 53; Sid. 71; 1 Wilson. 281; Co. Lit. 89; F. N. B. 93; Fitz. Abr. Process, 35; Bro. Action on the Case, pl. 67; 1 Rol. Rep. 63; Moor. 135; 1 Com. Dig. 3d edit. 239; Action on the case for Deceit. B; 4 Co. 4 a. b; 2 Cro. 330; Hob. 11; Molloy. 209; 3 Lev. 258; 3 Mod. 321; Moor. 462; 2 Lev. 69; 1 Vent. 199; 1 Mod. 85.

2. WHITFIELD V. LORD LE DESPENCER. E. T. 1778. K. B. Cowp. 754.

This was an action brought against the postmaster-general, for a bank-note, stolen by one of the sorters, out of a letter delivered into the Post Office. After an elaborate argument, in which the bearing, scope, and tendency of the acts of parliament were laid before the Court, and the liability of the defendant endeavored to be enforced, by showing that the conveyance of letters being a parliamentary monopoly, the government, or their substitutes, ought to stand in the same predicament as those whose office they had engrossed; viz. that they ought to be viewed as common carriers; it was contended that the defendant received a salary, which was itself a guarantee against a loss attaching to property entrusted to his care; and that the relation in which the sorter, stood to the defendant could not be urged as doubtful, for he was indubitably his servant; and in all cases the master is liable for the misconduct of his servant. It was also stated, that it was not clear but that the defendant might reimburse himself out of the Post Office fund. The Court however dissented from arguments so advanced, and Lord Mansfield accordingly delivered judgment as follows,—I shall consider this question in two lights; 1st, as it stood in the year 1699, before the determination of Lane v. Cotton (*supra* 61); 2d, as it stands now, since that determination; and also what has been done in consequence of that decision. And, 1st, as it stood in the year 1699.—The Post Office was first erected during the usurpation, by an ordinance of Cromwell, and afterwards more fully regulated by the statute 22 Car. 2. c. 35. There never had been any action brought, either upon that ordinance; or upon the statute, till the case of Lane v. Cotton; and the same mode of action that is now brought, was the mode fixed upon in that case. But neither from postmaster was not answerable for the loss of a letter with Exchequer bills in it;” Carth. 487; 12 Mod. 482. Now this was a case of ordinary neglect, for the bills were stolen out of the plaintiff's letter in the defendant's office; and as the master has a great salary for the discharge of his trust, as he ought clearly to answer for the acts of his clerks and agents; as the statute, professedly enacted for safety as well as dispatch, could not have been intended to deprive the subject of any benefit which he before enjoyed; for these reasons, and for many others, I believe that Cicero would have said what he wrote on a similar occasion to Trebatius, “*Ego tamen Scavoia assentior.*” It would, perhaps, have been sufficient under the statute, if the post had been robbed either by day or by night, when there is a necessity for travelling; but even that question would have been disputable.”

An action was, therefore, hold en not to lie against the post master-general for a [63] bank note stolen by one of the sorters out of a letter delivered into the post-office; but it was decided that the post master and all his inferior officers were responsible for their own personal negligence.

* This reason is scarcely tenable. In the statute 6 Geo. 1. c. 21. s. 52. for instance, it is provided, that all bills of exchange, &c. except such as are sent abroad, shall be paid for as so many letters.

the draft of the declaration by the advisers of that action, nor in the opinion of the judges upon the question, does it appear to have entered into the imagination of either, that this was a demand upon the *fund* belonging to the Post-Office; for the form of the action is not applicable to such a demand. If there could be a demand upon the *fund*, it must be by a totally different form of action. But this is a demand upon the postmaster *personally*, upon the ground of a neglect in him by his own act, or constructively so, by the fault of his servant. If the *fund* were in the nature of a policy of insurance, to insure every man who sends bills or notes by land or sea-carriage, from a loss by robbery or neglect, such contingency would be a deduction out of the *fund*; and no doubt, in that case, if a loss were to happen, upon an action brought against the proper officers, they would be liable, being bound by the positive constitution of the office to insure every person for the fixed and established rate of postage. But here the act of parliament has appropriated the whole revenue. Therefore, if a loss is paid, there must be an item of it, and that item must come under the appropriation. But it is manifest, no such idea was ever thought of at the time,—if it had been thought of, the ordinance of Cromwell, or the act of parliament, would, in terms, have charged the *fund* for all losses arising from neglect or otherwise. But neither this action, nor the case of *Lane v. Cotton*, is founded upon the ground of the *fund* being liable. What then is the ground? It is, that the postmaster, in consequence of the *hire* he receives, is liable for all the damage that may happen, whether owing to the negligence or dishonesty of the persons employed under him, to conduct and carry on the business of the office. If that position were founded in the extent in which it has been stated, it would go the length of making the defendants liable in all cases whatsoever. But the argument of Lord Chief Justice Holt, who differed from the other judges in the case of *Lane v. Cotton*, does not extend so far as that; for he takes a difference between the case of a letter lost in the office by a servant employed under the postmaster and that of a loss upon the road, or by the mail being robbed after the letter has been sent safe out of the office. The ground of Lord Chief Justice Holt's opinion in that case is founded upon comparing the situation of the postmaster to that of a *common carrier*, or the master of a ship taking goods on board for freight. Now, with great deference to so great an opinion, the comparison between a postmaster and a carrier, or the master of a ship, seems to me to hold in no particular whatsoever. The postmaster has no hire; enters into no contract; carries on no merchandize or commerce. But the Post Office is a branch of revenue, and a branch of police, created by act of parliament. As a branch of revenue, there are great receipts; but there is likewise a great surplus of benefit and advantage to the public, arising from the *fund*. As a branch of police, it puts the whole correspondence of the kingdom (for the exceptions are very trifling) under government, and entrusts the management and direction of it to the crown, and officers appointed by the crown. There is no analogy, therefore, between the case of a postmaster and a *common carrier*. The branch of revenue, and the branch of police are to be governed by different officers. The superior has the appointment of the inferior officers; but they give security to the crown. One requisite is, that they shall take the oaths taken by all public officers; another strong guard is, that they are made subject to heavy penalties; and this is carried so far, that what, in the case of a *common carrier*, or any other person, would be only a breach of trust, is in them declared to be a capital felony. All these advantages the law provides for the security of the public, in consideration of their being obliged to send their letters by this mode of conveyance. But the statute does not make the postmaster liable for any act done, except in one particular case, which is very remarkable, because it makes him liable for his own fault only (and not for that of his deputies,) in a case where it is hardly possible for the postmaster himself to be personally in fault. The statute (sect. 5.) creates a monopoly in the postmaster and his deputies or substitutes, of providing *post-horses*. And if any other person presumes to let to hire any post-horse for the purpose of carrying

letters, &c., he is liable to a penalty of 5*l.*, except where the postmaster or his deputies do not furnish horses within half an hour after an application made, for then the party is at liberty to hire a horse elsewhere. And in that case, "if it be through default or neglect of the postmaster, or his deputies, that such person fail of being furnished with a sufficient horse or horses in time, then the postmaster or his deputies are to forfeit 5*l.*" As to an action on the case lying against the party really offending, there can be no doubt of it: for whoever does an act by which another person receives an injury, is liable in an action for the injury sustained. If the man who receives a penny to carry the letters to the post-office, loses any of them he is answerable; so is the sorter in the business of his department. So is the postmaster for any fault of his own. Here no personal neglect is imputed to the defendants; nor is the action brought on that ground, but for a constructive negligence only by the act of their servants. In order to succeed, therefore, it must be shown, that it is a loss to be supported by the postmaster, which it certainly is not. As to the argument that has been drawn from the salary, which the defendant enjoys in a matter of revenue or police under the authority of an act of parliament, the salary annexed to the office is for no other consideration than the trouble of executing it. The case of the postmaster, therefore, is in no circumstance whatever, similar to that of a *common carrier*; but he is like all other public officers, such as the lords commissioners of the Treasury, the commissioners of the Excise and Customs, the auditors of the Exchequer, &c. who were never thought liable for the conduct of the inferior officers in their several departments. Thus then the question stood in 1699. In that year a solemn judgment was given, that an action on the case would not lie against the postmaster-general, for a loss in the post-office by the negligence of his servant. The nation understood it to be a judgment; and therefore it makes no difference, if what has been thrown out were true, that the writ of error was stopped in the way that has been mentioned. For the bar have taken notice of it as a judgment. The parliament and the people have taken notice of it. Every man who has sent a letter since has taken notice of it. Many acts of parliament for the regulation and improvement of the post-office, and other purposes relative to it, have passed since, which, by their silence, have recognised it. The mail has been robbed a hundred times since, and no actions have been brought. What have merchants done since, and continue to do at this day, as a caution and security against a loss? They cut their bills and notes into two or three parts, and send them at different times, one by this day's post and the other by the next. This shows the sense of mankind as to their remedy. If there could have been any doubt, therefore, before the determination of *Lane v. Cotton*, the solemn judgment in that case having stood uncontroverted ever since, puts the matter beyond dispute. Therefore we are all clearly of opinion that an action will not lie.

Per Cur. Judgment for the defendants. See 15 East. 384.

3. *ROWNING v. GOODCHILD.* T. T. 1773. K. B. 3 Wils. 443; S. C. 2 Bl. 906. *S. P. SMITH v. POWDICH.* M. T. 1775. K. B. Cowp. 182. *S. P. SMITH v. DENNIS.* M. T. 1773. K. B. Loft. 753.

This was an action against the deputy postmaster of Ipswich, for non-delivery of letters to the plaintiff, who had refused to pay an additional halfpenny for the delivery of them at his place of abode. The court held that by the statute 9 Anne. c. 17. all letters are to be delivered gratis, and that the action well lies against the deputy postmaster, for he has an original office, and is liable to answer for his own misconduct; and that plaintiff may sue either for the penalty of 5*l.* given by the statute for detention, or maintain an action on the case for damage sustained.

4. *STOCK v. HARRIS.* E. T. 1771. K. B. 5 Burr. 2109. *S. P. BARNES v. FOLEY.* E. T. 1776. K. B. cited id. 2711.

This was an action against the deputy postmaster of Gloucester, instituted on the same ground as the preceding case, by a person resident in the said city. The court held that the *postea* should be delivered to the plaintiff, ob-

A deputy postmaster was consequently considered liable for the non-delivery of a letter;

It not being beyond the limits of the delivery.

[66]

serving—the postmasters are not indeed bound to find out persons not sufficiently described; but if they know them, and they reside within the established limits, the postmasters are obliged to deliver their letters at their place of abode. The limits are clearly ascertained in this instance, it having been the invariable practice to deliver letters to parties resident within the city of Gloucester for the space of a century, which is a sufficient criterion, as the limits must be always fixed by usage and practice, and the course that has been observed and followed in each particular place. See 4 Geo. 2. c. 33. s. 66; 5 Geo. 3. c. 15. s. 4.

Where goods are to be conveyed by a common carrier they should regularly be left at the usual booking office, and entered there and paid for.

(b) *Of the delivery to the carrier.* 1st, *What is a sufficient delivery.* 1, *As respects the mode of delivery.*

1. *BUCKMAN v. LEVI.* E. T. 1813. N. P. 3 Campb. 414.

In this case Lord Ellenborough said, that in all cases, a person delivering goods to be conveyed by a carrier, is bound to procure them to be booked, or to deliver them to the carrier himself, or some person who could be proved to be his agent for the purpose of receiving them.

2. *SELWAY v. HOLLOWAY.* T. T. 1695. K. B. 1 Lord Raym. 46.

It having been held that the mere leaving of goods at an inn-yard from whence a carrier sets out, is no delivery to the carrier. So where a quantity of goods were left at a wharf, piled up among other goods with a direction

The question of whether a parcel of hops had been delivered to the defendant, as a carrier, arose in this case. It appeared that the hops were left at the inn where Holloway lodged, without proving any delivery to Holloway, or his servant, but only to a woman. (who had served Holloway before, but had quit- ted his service for five years) who said to the carman, if he laid them down, Holloway would find them. And upon the trial it was proved that there were many carriers who lodged at the same inn, but none of them went out the same day. A verdict was found for defendant; and upon a motion for a new trial, the court were all of opinion "that the hops could not be said to be delivered to Holloway, and therefore a new trial was denied; but if goods are delivered to a carrier's servant or agent, whom he appoints to receive goods for him, this is a sufficient delivery to and acceptance of them by the carrier."*

3. *BUCKMAN v. LEVI.* E. T. 1813. N. P. 3 Campb. 414.

It appeared that certain goods had been taken to a carrier's, and left on the premises, with a direction to the consignee, and piled up among other goods. No receipt was given for them, nor was any entry respecting them made in the carrier's books. The witness only swore that he took them to the carrier's, and saw a man, whom he believed to be a servant of the carrier's; but he did not know his name, and should not be able to recognize his person, and that he had no conversation with the carrier, or any other person upon the premises. Lord Ellenborough thought the delivery insufficient, and observed; No receipt was taken for the chairs. They were not booked. No person belonging to the carrier is fixed with a privy of their being left there. The person at the carrier's, where the things were left, might be a thief, watching for an opportunity to purloin them.

4. *WILLIAMS v. CRANSTON.* E. T. 1817. N. P. 2 Stark. 82. S. P. *GOUGER v. JOLLY.* T. T. 1816. London Sittings. Holt. N. P. C. 317.

[67] to the consignee, but no person belonging to the wharf fixed with a privy of their being left there, the delivery was held to be no delivery. The delivery of a parcel to the driver of a stage-coach is, however, a sufficient delivery to render the master liable.

Declaration against defendant, as a carrier, for losing a parcel containing a watch. It appeared that the defendant was the driver, and not the proprietor, of a coach; that the parcel had been delivered to him to carry, and that no contract or stipulation had been made for any reward to be paid for the conveyance. Lord Ellenborough held that plaintiff must be nonsuited. I accede, said he, to this proposition, that if the defendant could be considered as having taken the watch to be carried on his own account for a reward to be paid to him, he would be liable, although he acted in fraud of his master. If it could be shown that he had been in the habit of conveying parcels for hire, the case would certainly be altered; but being the mere servant, it cannot be inferred

* So where goods were delivered to a person standing at a warehouse door in an inn yard, who was employed in loading another waggon at the time, but the deliverer did not know the name of such person, Lord Kenyon held that there had been no sufficient delivery to charge the waggoner, although the deliverer told the person whom he saw by what waggon the goods were to go, and asked the owner's name; *MSS. B. N. P. 71. n.*

that he took the parcel to be carried for hire and reward, without further proof. At present the loss appears to have resulted from the negligence of the master through the medium of his servant.

5. *HYDE V. THE TRENT AND MERSEY NAVIGATION COMPANY. M. T. 1793. K. B. 5 T. R. 389*

In this case, Grose, Ashurst, and Buller, Js. in delivering judgment observed, that they thought it would be of importance to hold that carriers of goods could in no instances be discharged until the goods were carried home to their place of destination; and said—In general, the carrier appoints a porter, who provides a cart for the purpose of delivering the goods; but it would be open to an infinity of frauds, if the carrier could discharge himself of his responsibility by delivering them to a common porter, a person of no substance, a beggar of whose name the owner of the goods never heard, and against whom, in the event of the goods being lost, there could be no substantial remedy. In this case, the carriers fixed on the particular warehouse at which the goods were deposited on their arrival at Manchester, and made an agreement with their own carter, Hibbert, respecting the cartage. The defendants ought to be, therefore, answerable for the acts of those persons whom they nominate.

6. *ROBINSON V. DUNMORE. E. T. 1801. C. P. 2 B. & P. 419. S. P. CLARK V. GRAY. 4 Esp. 177.*

Chambre, J., in this case, said—The defendant is not charged as a common carrier; he is charged on a special undertaking; and the jury have found on good grounds that the undertaking stated in the declaration was made by the defendant. They have decided upon considering the whole transaction, that the words used by the defendant amounted to a warranty; and we cannot say that they have done wrong, for, however such luggage may be thought to be in some degree under the immediate care of the owner, yet his presence cannot free the carrier from his liability, inasmuch as the care of the owner amounts only to this—that it is much more for his interest to preserve his property, than that he should be put to the trouble of suing the carrier to recover its value, which cannot often be duly estimated, or the owner recompensed in pecuniary damages.—*Postea* to the plaintiffs.

7. *EAST INDIA COMPANY. V. PULLEN. H. T. 1725 K. B. 1 Str. 690.*

Action against the defendant, as a common carrier, on an undertaking to carry for hire, on the river Thames, from the ship to the company's warehouses. Upon evidence, it appeared that the defendant was a common lighter-man, and that it was the usage of the company, on the unshipping of their goods, to place an officer, who is called a guardian, in the lighter, who, as soon as the lading is taken in, puts the company's lock on the hatches, and goes with the goods to see them safe delivered at the warehouse, that such practice had been adhered to in this case, and that part of the goods were lost. The Chief Justice was of opinion, this differed from the common case, there not being any trust in the defendant, as the goods were not to be considered as ever having been in his possession, but in the possession of the company's servant, who had hired the lighter to use himself. The plaintiff's were nonsuited.

8. *ROBINSON V. DUNMORE. E. T. 1801. C. P. 2 B. & P. 416.*

A. sent goods by B., who said, "I will warrant they shall go safe." The question which now arose was, whether B. was liable for any damage sustained by the goods, notwithstanding A. sent one of his own servants in B's cart to

* But it would appear that for gross negligence in any of the carrier's servants, such as the proprietors of a booking office, &c. an action might also lie against the individual by whose misfeasance any damage may be sustained; see 5 T. R. 389.

† If effects of great value are delivered to a common hoyman, and the owner afterwards delivers them to another person in the boat to keep safely, but does not discharge the hoyman, and they are afterwards lost through negligence, an action lies against the hoyman; Roll. Abr. 2. (C.) pl. 3. So it is no excuse for an innkeeper to say that he delivered to his guest the key of the chamber door in which he is lodged, and that he left his chamber door open; but he ought to keep the goods and chattels of his guests in safety.

See 22 H. 6. 21; 11 H. 4. 45; Ed. 3. 11; Calve's case, 3 Co. 53.

Drivers of coaches, porters, and warehouse receivers, even though they receive a separate charge for their trouble, being the carrier's servants.*

It has been holden that the delivery if otherwise complete, will not be affected by the fact of a person travelling in the conveyance in which the property is carried and having his eye on the goods during the journey.†

It is never the less, clear, that where a party refuses to place any trust in the carrier, as by sending his servant with the goods, and no evidence of a direct bailment exists, no duty will arise, or liability attach. But a carrier may, of course, undertake specially for the safe delivery of

[69] look after them. And although it was argued that the defendant never had such goods, such possession of the plaintiff's goods as to render him liable in the character of a common carrier; that on the contrary it was clear, from the plaintiff having sent his servant to accompany the cart, that he never intended to relinquish his control over the goods; that the case strongly resembled that of the East India Company v. Pullen, 1 Stra 690; that it was true that in the case before the court, the defendant made use of the expression that he would warrant that the goods should go safe, but that under all the circumstances, it might be argued that it was not his intention by that expression to do any thing more than enforce his own opinion; Ashurst, J. said—the defendant in this case is not charged as a common carrier, he is charged on a special undertaking; and the jury have found on good grounds that the undertaking stated in the declaration was made by the defendant. They have decided upon a view of the whole facts of the case, that the words used by the defendant amounted to a warranty; and we cannot say that they have arrived at an improper or erroneous conclusion.—*Postea* to the plaintiff.

2. *As respects the state of goods when delivered.*

1. BECK V. EVANS. M. T. 1812. K. B. 16 East. 244.

The goods must be properly packed when delivered. The defendant was a common carrier of goods. A cask of brandy had been delivered to him, which leaked during the journey, and it appeared that he had been informed of that circumstance. He, however, made no examination of the cask, nor took any step to prevent the leakage. On this action being brought against him, he relied on a notice not to be answerable beyond a certain sum, which the judge, however, thought unavailable, as he must have known it was a cask of brandy from the permit, which was delivered with it; and therefore could not claim the benefit of the notice, which, in all cases, only operates where the goods are of a much larger value than from a knowledge of their bulk or quantity the carrier can possibly guess them to be. There was then some attempt to show that the cask was in a damaged state when it was put into the waggon, which attempt, however, failed in the opinion of the Court and jury. On motion to enter a nonsuit, the Court refused the rule.

2. STUART V. CRAWLEY. H. T. 1818. N. P. 2 Stark. 323.

But the carrier cannot absolve himself from liability, where he has the means of observing the risk he runs in accepting the commodity to be carried in the state it is presented to him, and with such knowledge gives a receipt. The defence set up in this action, which was brought by the plaintiff against the defendant, in his capacity of a common carrier of goods, for the loss of a greyhound, was, that the dog was not properly secured when delivered to him. It appeared that the dog had been taken to the defendant's booking office, with a cord about his neck, and in that state committed to the care of the book-keeper, who gave a receipt acknowledging the delivery. But the defendant contended that there should have been a collar about the dog's neck, or some other mode adopted by plaintiff to have insured the probable security of the animal. Lord Ellenborough held that the defendant was responsible. In point of law the defendant had acknowledged the delivery of the dog to him by giving a receipt. The case was not like that of a delivery of goods imperfectly packed, since there the defect was not visible; but in this case the defendant had the means of seeing that the dog was insufficiently secured.

2d. *Of the effect of the delivery.*

1. *As respects the rights of the carrier.*

1. THOMAS V. DAY. H. T. 1803. N. P. 4 Esp. 262. S. P. COBBAN V. DOWNE. T. T. 1803. N. P. 5 Esp. 42.

Upon the delivery of the goods a carrier's liability in goods lost or injured from the time he applied to raise them into the warehouse; and that it was no defence that they were injured by falling into the street from the breaking of the tackle, the carman who brought the goods having refused the offer of slings for further security.

2. GOODWIN V. RICHARDSON. Roll. Abr. 5. and cited in ARNOLD V. JEFFERSON. Ld. Raym. 278; and WILBRAHAM V. SNOW. 1 Vent. 52.

From which it follows, as a necessary and just Per Brampt, C. J. If a common carrier have goods delivered to him to convey to a specified distance, and a stranger take them out of his possession

and convert them to his own use, an action of trover and conversion lies by rule, that the carrier against him, for he has a special property in the goods, and is bound by the terms of his contract to remunerate the owner for the loss of them. See Co. Lit. 89; 4 Co. 83; 7 H. 6. 43. 60; 2 Bulst. 311; Sid. 433; Mod. 30; 2 Saund. 47; Yelv. 44; Dyer. 98; 2 Hawk. P. C. 167; 13 E. 4. 10; Dalt. c. 102; Kelynge. 35; Roll. Abr. 73; Hawk. P. C. 90; H. P. C. 62; 3 Inst. 107. 310; Bro. Coron. 45. 160; 5 H. 7. 18. b; Cro. Eliz. 536; Mo. Pl. 981; H. P. C. 67. Kelw. 70; Hawk. P. C. 94; 2 Id. Raym. 792. 3. DEAKIN'S CASE. Old Bailey. April Sessions. 1800. 2 Leach. Cr. L. 862; S. C. Keb. 39.

Indictment by the proprietor of a stage-coach against the driver and another for purloining a box in the course of conveyance by their coach; and upon the question, whether the driver had the possession of the goods, or the bare charge only, it was said by Hotham, B., in delivering the opinion of the 12 judges, that the law on an indictment against the driver of a stage-coach, on the prosecution of the proprietors, considers the driver to have the bare charge of the goods belonging to the coach; but on a charge against any other person for taking them tortiously and feloniously out of the driver's custody, he must be considered as the possessor; they are entrusted to his custody and disposal during the journey; and the inconvenience would be great indeed if the law were otherwise; the difficulties and mistakes which must unavoidably arise in hunting after all the persons who may be concerned as proprietors of a stage-coach, for the purpose of prosecuting an indictment of this nature, would be endless and insurmountable.

2. *As respects the rights of the consignor and consignee.*

(a 1) *Considered generally.*

1. DAVES v. PECK. M. T. 1799. K. B. 8 T. R. 330; S. C. 3 Esp. 12. S. P.

DUTTON v. SOLOMONSON. M. T. 1803. C. P. 3 B. & P. 582. Contr. FL.

WELLIN v. RAVE. 1 Bulst. 68.

Plaintiff sent certain goods to a person named Odey, by a common carrier. A question arose who ought to have brought this action, which was instituted for a breach in defendant's implied contract to carry safely. The judge nonsuited the plaintiff, being of opinion that the action could not be supported for that the legal right to the goods after such delivery was vested in the consignee, to whom alone the carrier was answerable, if at all. On a rule nisi obtained to set aside the nonsuit, the Court, in discharging it, said: the plaintiff, who was at one time the owner of these goods, delivered them, by the order of Odey, to the defendant, a common carrier, for the purpose of having them conveyed to Odey. By such delivery they became the property of Odey; he was liable to be sued for the value of them; and it is admitted that he might have maintained an action for any loss or injury happening to them by the default of the defendant. It is true, that while the goods remained in the hands of the carrier, there was a latent right in the plaintiff to stop them in transitu; but that is in its nature an equitable right, though now grown into a law; but the legal right was, by the delivery to the carrier vested in the consignee, by whose order they were so delivered. See 1 Atk. 248; F. N. B. 138.

2. GRIFFIN v. LANGFIELD. T. T. 1812. N. P. 3. Campb. 254.

Goods had been delivered to a carrier for defendant, when he was under age. It appeared that he had, however, reached his twenty-first year prior to the carrier's arrival at the place where he lived. It was contended, in opposition to the arguments for defendant, that the cause of action was not complete until the defendant came of age. Sed per Lord Ellenborough. The delivery to the carrier vested the property in the defendant, and created a promise at that time to pay for them. He was then under age. The promise made by him was, therefore, nugatory. The jury gave a verdict for plaintiff.

See 3 B. & P. 582.

3. DAVES v. PECK. M. T. 1799. K. B. 8 T. R. 330; S. C. 3 Esp. 12.

In this case the counsel for the plaintiff, who was the consignor of goods sent by defendant, as a common carrier, by whom the present action was now

he has from that period a special property in the goods, so as to entitle him to maintain an action for their recovery in case of a loss;

Or indict parties robbed him of them.

[71]

But the delivery to the carrier vests an absolute property in the consignee.

And this rule is so inveterate, that, to that, where goods were delivered to a carrier a day before, and reached the consignee a day after, he came of age, it was held that he might discharge himself on the ground of infancy.

Nor will the circumstance of the consignor's having

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ing paid the booking;

[72]

brought to recover their value; and who, it appeared, had booked them at the usual place for booking such parcels contended that it did not follow, that because the consignee might maintain an action against a carrier for the loss of goods, the consignor might not also have his remedy; that there was, in fact, a greater privity of contract between the consignor and carrier, than between the latter and the consignee; and that at all events the booking was paid for by the consignor, which was evidence of a contract between him and the carrier; and in support of their positions they cited 5 Burr. 2680; 1 T. R. 659.

Sed per Cur. Some stress has been laid on the circumstance of the consignor having paid the carrier for booking the goods, as evidence of a special contract between them, in order to bring this case within those which were cited at the bar; but that circumstance would not give a right of action against the carrier, to recover damage for the loss of the goods, if it appeared that they were the property of another person; and here it is admitted, that the action might have been brought by the consignee in right of his property in them. It is true, that in some special cases a man may make himself liable to either of two persons, on account of the same interest; but that is not usual; and it is more consonant to the general principle of law to refer all transactions of agents to the principal on whose account they were entered into. Now here we consider that what was done by the consignor in respect of the booking, was as the agent of the consignee, at whose risk the goods were sent; and, generally speaking, the carrier knows nothing of the consignor, but only of the person for whom the goods are directed, and to whom he looks for the price of the carriage upon delivery. The cases cited proceeded on a ground quite distinct from the present. In the one case, the action brought by the consignor against the carrier, was sustained, because the consignor was to be answerable for the price of the carriage; he stood, therefore, in the character of an insurer to the consignee for the safe arrival of the goods; and the subsequent case in Term Reports proceeded on the same ground.

4. *REX v. MEREDITH.* Lent Ass. 1811. 2 Campb. 639.

Or of his being responsible to the carrier for the price of the carriage, make any difference.

This was an action by the vendor against the vendee, for the price of some brandy and rum. When delivered to the carrier, the spirits were of legal proof, but were under proof when delivered to defendant, and were, therefore, seized by the excise. The carrier was to be paid by the plaintiff, which, it was urged, rendered him an insurer of the spirits whilst in the carrier's hands.

Sed per Lawrence, J. The mode in which the carrier was to be paid is immaterial. The delivery to the carrier vested the property in the spirits in the defendant.—Verdict for plaintiff.

5. *DAVIS v. JONES.* M. T. 1771. K. B. 5 Burr. 2680.

It is indeed observable, that it has been hold en that the property is still so far in the con [73] signor that he may maintain an action against the carrier for the loss of goods where he has made himself responsible to the carrier for the price of the carriage;

This was an action against a common carrier for not delivering goods sent by him; and the only question was, in whose name the action ought to have been brought. The fact was, that the present plaintiffs were manufacturers of cloth, and their declaration charged, that they being possessed of cloth, as of their own proper goods, delivered the same to the defendant, being the common carrier, &c. and requested him to deliver it safely and securely for them, to one E. B. at &c. which they undertook to do, for a reasonable price, payable and paid by the said plaintiff's to the defendant, but the goods were lost and never delivered. The defendant pleaded "not guilty," and the plaintiffs obtained a verdict. The defendant's counsel moved for a new trial, objecting that the action ought to have been brought in the name of the consignee of the goods, and not in the name of the consignors; for that the consignors parted with their property upon their delivering the goods to the carrier; and that no property remained in them after such delivery. Lord Mansfield said: there was neither law nor conscience in the objection. The vesting of the property may differ according to the circumstances of cases; but it does not enter into the present question. This is an action upon the agreement between the plaintiffs and the carrier. The plaintiffs were to pay him; therefore the action is properly brought by the persons who agreed with him, and were to pay him.

6. *MOORE v. WILSON.* E. T. 1787. K. B. 1 T. R. 659.

Assumpsit by consignor against the defendant, a common carrier, for not And the safely carrying and delivering goods for a certain hire and reward, alleged to be paid by the plaintiff, but which it was proved was to be paid by the consignee; and held, that whatever might be the contract between the vendor and vendee, the actual agreement for the carriage was between the vendor and carrier, the latter of whom was by law liable upon that agreement, and the rule was made absolute for setting aside a nonsuit which had been recorded against the plaintiff. See 1 Atk. 248.

7. JOSEPH V. KNOX. H. T. 1813. K. B. 3 Campb. N. P. C. 321. S. P. EVANS v. MARLETT. M. T. 1696. K. B. 1 Lord Raym 271; S. C. 12 Mod. 156; S. C. 3 Salk. 290.

Action against a ship owner for not carrying goods. The bill of lading stated the goods to have been shipped by the plaintiffs in London, and that the freight was paid there; Lord Ellenborough said—I am of opinion that this action well lies. There is a privity of contract established between these parties by means of the bill of lading. To the plaintiffs, therefore, from whom the consideration moves, and to whom the promise is made, the defendant is liable for the non-delivery of the goods. After such a bill of lading has been signed by his agent, he cannot say to the shippers, they have no interest in the goods, and are not damaged by his breach of the contract. I think the plaintiffs are entitled to recover the value of the goods, and they will hold the same recovered as trustees for the real owner.

8. SARGENT V. MORRIS. H. T. 1820. K. B. 3 B. & A. 277.

By a bill of lading, the captain was to deliver the goods for the consignor, and in his name, to the consignee. At the time of shipment the consignee had no property in the goods. The question which now occupied the attention of the court was, whether it appearing that the consignee had insured the goods, and advanced the premiums of insurance before the arrival of the ship; the present action had been properly commenced by the plaintiff, the consignee, against the defendant, the ship-owner. *Per Cur.* In the case of Evans v. Marlett, (1 Lord Raym. 271.) this distinction is taken; if goods by bill of lading are consigned to A., A. is the owner, and must bring the action against the master of the ship if they are lost; but if the bill be special to deliver to A. for the use of B., B. ought to bring the action. That case is precisely in point. I think that the action here must be brought in the name of the consignor, the contracting party. It is true, if the goods had been delivered to him, that he would have had a lien to the extent of any advances he had made for freight or insurance on account of his principal; and if there had been any deviation so as to discharge the underwriters, and the goods had never arrived, he would have been entitled to recover against the consignor for such advances. A transfer of the property is, however, very different from the transfer of the contract. It appears to me that this action, at the suit of the present plaintiff, is not maintainable. See 1 Campb. 369.

9. ANON. Sittings before Gould J. at Maidstone, cited 3 Esp. 115; confirmed by Lord Kenyon in 3 Esp. 115.

A carrier had a parcel of goods delivered to him to be carried from Maidstone to London. While the goods lay at his warehouse, a person came there, who said the goods were his, and claimed them from the carrier; the carrier said, he could not deliver them; but that if he was indemnified he would keep them, and not deliver them according to order. An indemnity was given, and the goods not being delivered according to order, the party, by whom they were delivered to the carrier, brought an action against the carrier. Mr. Justice Gould would not permit him to set up any question of property out of the plaintiff; and held, that he having received them from him, was precluded from questioning his title, or showing property in any other person.

* Where goods were delivered to a carrier at Exeter, to convey to Falmouth, and there deliver them to an agent, who was to forward them to the consignee abroad; and the carrier detained the goods on the ground of a lien against the agent for his general balance, it was holden, that trover might be maintained against the carrier at the suit of the consignee; Tagliabue v. Wynn, Cornwall Lent Assizes, 1813; Wood. B. MSS. Selw. N. P. 422. 6th edit.

10. DUTTON v. SOLOMONSON. M. T. 1803. C. P. 3 B. & P. 582. S. P. COOKE v. LUDLOW. H. T. 1806. C. P. 2 N. R. 119. S. P. GODFREY v. FURZO. T. T. 1733. 3 P. Wms. Rep. 186; *Sed vide* GRAVES v. CHILD. E. T. 2 Ann. MSS. B. N. P. 36; HAYNES v. WOOD. 1686. id. 36. a.

The above rules hold as well where the particular carrier is not named by the consignee, [75]

Assumpsit for goods sold and delivered under a contract to pay for them by a bill at two months, which the defendant afterwards refused to accept until after the goods had arrived, and then only at three months. The writ was sued out before the bill, if accepted, could have become due; and on that point it was held that the action could not be commenced before the expiration of the period which the bill had to run. (Mussen v. Price. 4 East. R. 147.) And upon the principal question, as to the delivery of the goods, which did not arrive until after the writ had been sued out; Lord Alvanley said—When this point was first mentioned I was surprised, for it appeared to me to be a proposition as well settled as any in the law; that if a tradesman order goods to be sent by a carrier, though he does not name any particular carrier, the moment the goods are delivered to the carrier, it operates as a delivery to the consignee; the whole property immediately vests in him, he alone can bring an action for any injury done to the goods; and if any accident happen to the goods it is at his risk.

11. DAVES v. PECK. M. T. 1799. K. B. 8 T. R. 330. S. P. GROING v. MURDHAM. 5 M. & S. 189. S. P. HART v. SATTLEY. H. T. 1814. C. P. 3 Campb. N. P. C. 528. S. P. OGLE v. ATKINSON. 1 Marsh. 323; S. C. 5 Taunt. 759. S. P. TWINING v. TRUEMAN. Guildhall. 1790. MS. Bul. N. P. 36. a. n.

As where he is.

Case by consignor against a carrier, named by the consignee for so negligently carrying spirits, that the permits expired, and the goods were seized. The Court said—The question of the proper person to maintain the action must be governed by the consideration in whom the legal right was vested, for he is the person who has sustained the loss, and the proper person to call for a compensation. The right of property on which this action is founded, is not to fluctuate according to the choice of the consignor or consignee, that either of them may at his pleasure maintain an action against the carrier for the non-delivery or damage of the goods; what was done by the consignor in respect of the booking, was as agent of the consignee, at whose risk the goods were sent. The legal property of the goods was, by the delivery to the carrier, vested in the consignee, and the action ought to have been brought by him.—Judgment for the defendant.¶

12. VALE v. BAYLE. E. T. 1775. K. B. Cowp. 294.

Although it would seem as if this point had not been viewed in this light so late as the year 1775.

Action for goods sold and delivered, which the purchaser had directed to be sent by land carriage generally. The plaintiff accordingly sent them by the only conveyance there was by land carriage, and the goods were lost on the road. It was questioned by the counsel for the defendant, whether the goods when delivered to the carrier were to be considered as delivered to defendant; and Lord Mansfield said—It is as much as if the defendant had mentioned the particular carrier by name; for there being but one carrier, the plaintiff had no choice by whom to send them. If a vendor take upon himself actually to deliver the goods to the vendee, he stands to all risks, but if the vendee order a particular conveyance, the vendor is excused.

13. GODFREY v. FURZO. T. T. 1733. 3 P. Wms. 186.

And they prevail as well where goods are sent from England to a foreign country;

Per Lord Chancellor King. When a merchant beyond sea consigns goods to a merchant in London, on account of the latter, and draws bills on him for such goods; though the money is not paid, yet the property of the goods vests in the merchant in London, who is credited for them, and consequently they are liable to his debts.

- [76] 14. BROWN v. HODGSON. H. T. 1809. Adjourned sittings in London. Sel. N. P. 421. S. C. 2 Campb. 36.

Or from a foreign country to England,

The plaintiff had shipped goods on board the *Mercurius*, of which the defendant was owner, to be carried from London to Tonningen. The goods (as appeared by an admission on the part of the plaintiff) were expressed in the

bills of lading to be shipped by order on account of Hesse and Co. of Hamburg. The ship arrived in the river Eyder, but was prevented from proceeding to Tonningen by the commander of one of his majesty's frigates, and ordered to return home. After her return the captain made an affidavit that he believed the cargo to be Danish property; whereupon the goods were unloaded and delivered over to the admiralty marshal, and libelled in the admiralty court; the plaintiff afterwards recovered them by a proceeding in that court. The action was brought to recover the expences incurred by the suit in the admiralty. On the part of the defendant it was insisted that the goods being shipped by order, and on account of Hesse and Co. the property vested in them immediately on their being shipped on board the *Mercurius*; *Dawes v. Peck*, and *Dutton v. Solomonson*, were cited. It was also urged that a recovery by the present plaintiff, could not protect the defendant from an action at the suit of Hesse and Co. On the part of the plaintiff it was contended that there was a distinction between the carrying goods from one part of England to another, and the transporting them beyond sea; that after a delivery of goods to a carrier, to carry them from one part of England to another, the vendor had no property in the goods, but only a right of stopping *in transitu*, and it was admitted that if the goods were directed to be sent by a carrier without specifying the carrier, the delivery to the carrier was a delivery to the vendee; but urged that in the case of goods sent abroad, if the goods arrived safe, they were to be paid for; *aliter* if they do not arrive. Lord Ellenborough, C. J. said—they are shipped by order, on account of Hesse and Co. I can recognise no property but that recognised by the bill of lading.—Plaintiff nonsuited.

15. *Craven v. Rider*. H. T. 1816. C. P. 6 Taunt. 433. S. P. *Ogle v. Atkinson*. 1 Marsh. 323; S. C. 5 Taunt. 759.

The Court held in this case that the vendor of goods might so far abstain from conferring an absolute right on the vendee by a delivery to the carrier by whom they were to be conveyed from the one to the other, by qualifying the delivery so as to rebut any inference deducible from the general rule on the subject; and held, that in the case before them, as the goods delivered on board the vessel by which they were to be transmitted to the consignee were expressed in the receipt given to the lightermen, to be for and on account of the shipper; it gave the holder of the receipt a control over the goods until exchanged for the bill of lading.†

16. *Dutton v. Solomonson*. M. T. 1803. C. P. 3 B. & P. 582.

Per Lord Alvanley. The only exception to the purchaser's right over the goods is, that the vendor in case of the former becoming insolvent may stop them *in transitu*.

17. *Buckman v. Levi*. E. T. 1813. Adjourned Sittings at Guildhall. 3 Campb. N. P. C. 414.

Per Lord Ellenborough. A delivery of goods to a carrier or wharfinger is sufficient to charge the purchaser; but he has a right to require that in making this delivery due care and diligence shall be exercised by the seller. Before

* The two last cases have been inserted under this division of the subject; in preference to the subsequent part of this title relative to Carriers by Water, to whom, it may be supposed, they are of the greatest importance; for two reasons; 1st. Because they are illustrative of the extent of the general rule propounded in the preceding cases; and, 2d, because it must frequently happen that these decisions may be applicable to carriers by land; as for instance, where the latter intend to convey goods from London to Paris.

† And the master of the vessel, upon tender of such a receipt by a lighterman, is bound to sign it; and his refusal to do so will not impair the right of the seller; 5 B. & A. 382; see *Goodhart v. Lowe*. 2 Jac. & Walk. 349.

‡ The general nature of this privilege, and its effect upon the respective rights of the parties interested in the goods; the particular instances in which the immunity exists, and the original cause of its being established by the law of England; the manner in which the stoppage should be made; and the various individuals at whose direct or indirect instance it may be enforced; the different causes which lead to a determination of the *transitus*; with a full illustration of those principles which govern the rudiments of, and an epitome of the practice relating to, the general law of stoppage *in transitu*; will be laid down, and commented upon; in the subsequent part of this work; vide post, tit. "Stoppage in Transitu."

But the consignor may retain a control over the goods by qualifying the delivery: [77]

And is in all cases entitled to stop the goods *in transitu*. ‡ It may here however, be as well to observe, that in order to render the delivery to the carrier so complete as

to charge the vendee, in must be in such a manner as to furnish the purchaser or with a remedy over against the carrier in case of a loss.

And altho' it has been holden that a vendor is not bound to enter and insure the goods with the carrier

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as above the limited value, with out instructions for that purpose.

Yet it would appear, that if the carrier's liability be notoriously limited to a certain sum the neglect of the consignor to insure accordingly, is a bar to his recovery against the consignee for the value of the property alleged to have been delivered to him.

At all events it is clear, that if other goods have been forwarded to the consignee by the same conveyance

the purchaser can be charged, he must be put into a situation to resort to the wharfinger or carrier for his indemnity. The vendor must, therefore, adopt such plans as are in general deemed necessary to make a responsibility attach to the bailee. He must consequently take a receipt for the goods when entrusted to the care of a carrier, or procure them to be booked; or by a delivery either to the bailee or his agent, for either the party himself, or some one else connected with him, with a privity of their being left at the carrier's place of resort, or the wharfinger's receiving house.

18. COTHAY v TUTE. M. T. 1811. Adjourned Sittings in London. 3 Campb. 129.

The defence set up by the defendant in this action, which was for goods sold and delivered, and which had been sent to defendant in consequence of a letter from him, desiring plaintiff to transmit 60lb. of cochineal by the first coach; but which, it appeared in evidence, had been delivered to a carrier, to be conveyed by him to defendant, and lost on the road, was, that the plaintiff had by his negligence or omission in not insuring the goods at the coach-office as above the value of 5*l*. deprived the defendant of his remedy over against the carrier; it being proved that there was a notice stuck up in the coach-office to this effect, that the proprietors would not be answerable for any package above the value of 5*l* unless entered as such, and paid for accordingly. Lord Ellenborough said, that the point did not properly arise, as the defendant having ordered more of a commodity which had been previously sent to him, was bound to show that the former quantity had been insured, from the establishment of which fact the plaintiff could not but have been bound to have pursued the same plan with reference to the quantity of cochineal, which is the subject of the issue to be tried by the jury. But that as it was in practice so unusual to comply with these notices, he should be inclined to hold, that the vendor was not bound to do so without express instructions for that purpose. He also suggested a doubt how far the purchaser, could be holden liable for the additional expense of insuring, were the vendor to do so of his own accord.

19. CLARKE v. HUTCHINS. M. T. 1811. K. B. 14 East. 475.

This was an action for goods sold and delivered, the price of which was 51*l*. The defendant, who lived at G., ordered goods from the plaintiff, who lived at P. and who sent them accordingly to a receiving house of the owners of a vessel trading for this purpose between the two places, the owners of which had published cards, and sufficiently established a notoriety in the place, that they would not be answerable for any package above 5*l*. but the plaintiff made no special entry or payment pursuant to the notice. The goods in fact were never delivered to the defendant, and no further account was given of them, and he refused to pay for them on the ground that by the plaintiff's neglect in not making a special entry of them pursuant to the notice, he could have no remedy over against the carriers. The court determined, that the plaintiff was bound to enter the goods specially; and Lord Ellenborough, C. J. said—The plaintiff cannot be said to have deposited the goods in the usual and ordinary way for the purpose of forwarding them to the defendant, unless he took the usual, and ordinary precaution which the notoriety of the carriers general undertaking required, with respect to goods of this value, to ensure them a safe conveyance, that is, by making a special entry of them.

20. COTHAY v TUTE. M. T. 1811. Adjourned Sittings in London. 3 Campb. 129.

The court held in this case that where a person in the country gives an order to a tradesman in London with whom he has been in the habit of dealing, to send him down more goods by a particular coach, and at the office of this coach there is a notice stuck up, intimating that the proprietors will not be answerable for goods above the value of 5*l*. unless insured, it is enough for the vendor to deliver the goods ordered at this office, although they be above the value of 5*l*. without insuring them, unless insured for the purchaser in former instances.

and insured by the consignor, he is bound to pursue the same plan with reference to the second cargo he consigns,

21. COOKE v. LUDLOW. H. T. 1806. C. P. 2 N. R. 119.

A. in London, received an order from B. in Bristol, to send goods to him

by any conveyance which would reach Bristol (as B. lived only six miles from [79] thence,) informing B. when he sent them that B. might know when to expect them. But if the seller sold low the direction prescribed by the purchase. A. sent the goods to a wharf, from whence vessels for Bristol sailed, and informed B., as he was told at the wharf, that the goods would come by the ship Commerce; in fact the goods were not sent on board the Commerce, which happened to be fully laden, but some time afterwards were sent by another vessel. B., after the arrival of the Commerce at Bristol without the goods, made no further inquiry for the goods, and A. did not know, till after he had required payment of the goods, that they had been sent by another ship, which he then communicated to B. This was an action of *assumpsit* for goods sold and delivered, and goods bargained and sold, instituted by A. against B.; the court, after argument, determined that the plaintiff was entitled to recover. And Heath, J. said—I do not consider the wharfinger as in any degree the agent of the plaintiffs; he is the agent of the defendant, by whose order and direction the goods were sent. No negligence is imputable to the plaintiffs in not inquiring after the goods. They had no notice of non-delivery until the time when they required payment for the property consigned. Nothing is more common than in the case of waggons, where one is full to send the goods by the next.

22. *HAWKINS v. RUTT*. T. T. 1793. Sittings at Guildhall. Peake. N. P. C. And used due caution in other respects, the goods sold and delivered to them, contended that they were not responsible, delivery they having, in compliance with plaintiff's request, remitted him bills of exchange of sufficient value to satisfy his demand. The plaintiff, on the other hand, urged that he was entitled to maintain this action, never having received any of the bills, inasmuch as the plaintiff had not used due precaution in sending the letter containing the bills, it appearing that it had been delivered to a bellman in the street. Per Lord Kenyon. The defendants in this case have not used due caution; they ought to have delivered the letter at the General Post Office in Lombard-street, or to one of the houses authorised by that office to receive letters with money, and not to a bellman in the street.

(b 1.) *Considered with reference to the statute of frauds.*

Vide post, tit. Statute of Frauds.

(C) OF THEIR DUTIES AND LIABILITIES.

1st. *Of direct liabilities.*

1. *Previous to the commencement of their journey.*

(a 1) *Common carriers must not refuse to carry goods.*

1. *JACKSON v. ROGERS*. M. T. 1683. K. B. 2 Show. 327; 1 Show. 104.
LANE v. COTTON. E. T. 1701. K. B. 1 Lord Raym. 654; S. C. 1 Salk. 17; S. C. 5 Mod. 455; S. C. 12 Mod. 482. S. C. Carth. 487; Hok. 582; Comyn. 100. S. P. ANON. M. T. 12 Mod. 3. S. P. MORSE v. SLUE. H. T. 1671. K. B. 1 Vent. 190. 238; S. C. 1 Mod. 35. S. C. 2 Lev. 69; S. P. B. N. P. 70. S. P. BATSON v. DONOVAN. M. T. 1820. K. B. 4 B & A. 32. S. P. 1 Williams. Sanders. 312. n. 2. S. P. BOULSTON v. SANDIFER. H. T. 1690. K. B. Skin. 279.

This was a declaration in an action on the case, averring that the defendant was a common carrier from London to Lymington, and setting it forth, as the custom of England, that he was bound to carry goods, and that the plaintiff brought him such a pack, and that he refused to carry them, though offered his hire. It was alleged and proved that he had convenience to carry the same.

Jefferies, C. J. said—The action is maintainable, as well as it is against an innkeeper for refusing a guest; or a smith on the road who refuses to shoe any horse, being tendered satisfaction for the same.—The plaintiff had a verdict, *if he has a convenience to carry the same.*

2. *LOVETT v. HOBBS*. T. T. 1680. K. B. 2 Show. 127. S. P. BATSON v. DONOVAN. M. T. 1820. K. B. 4 B. & A. 32.

Action against a coach master for refusal to carry goods. But evidence being given that the coach was full, upon which ground the defendant refused to

take charge of the goods, it was allowed to operate as a sufficient excuse;* for if an ostler refuses a guest, his house being full, and yet the party says he will shift, &c. if he be robbed, the ostler is discharged, which fact being left to the jury, there was a verdict for defendant. See Doct. & Lev. 138; 1 East. 604; 3. BATSON v. DONOVAN. M. T. 1820. K. B. 4 B. & A. 32.

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And holds himself out as ready to convey all sorts of goods.

Per Cur. It has been laid down that where a carrier has convenience to carry goods, he cannot refuse to take the goods of any particular person; and possibly an action might lie against him if he refused to take such goods, without a sufficient reason for the refusal. It would, however, be a reasonable excuse for not carrying goods of great value, either if it appeared that the carrier did not hold himself out as a person ready to convey all sorts of goods, or that he had not convenient means of conveying with security such articles.

* So it has been said, that a refusal was reasonable, when it appeared, that it was a time of public commotion, and that the goods which the carrier was desired to carry were the object of public fury, and would be attended with a risk against which the carrier's precaution would be inadequate to secure him; Nichols's Notes to Jones on Bailments, 103. e. citing *Edwards v. Sherratt*, 1 East. 604. Jeremy, p. 56. But Sir W. Jones, in his *Essay on Bailments*, when examining the nature of the liability on innholders, says; "It has long been holden that an innkeeper is bound to restitution, if the trunks or parcels of his guests, committed to him either personally or through one of his agents, be damaged in his inn, or stolen out of it, by any person whatever; nor shall he discharge himself from this responsibility by a refusal to take any care of the goods, because there are suspected persons in the house, for whose conduct he cannot be answerable. It is otherwise, indeed, if he refuse admission to a traveller because he really has no room for him, and the traveller nevertheless insist upon; entering, and place his baggage in a chamber without the keeper's consent." Upon what ground, therefore, it may be asked, has a common carrier of goods the privilege of refusing to incur the usual responsibility under circumstances of more than ordinary peril, when it is clear that an innkeeper has never been considered entitled to such immunity? The foundation of their common law liability is the same; the risks we have supposed they may run in the above cases are not of a nature dissimilar, so as to lay the foundation in the one case for a rule dissimilar to the other. The means they may employ to avert and guard themselves against any detrimental consequences are not only of a kin, but are decidedly in favour of carriers of goods; as they may, in all cases, make a special acceptance of the goods, and guard against any particular hazards; and as the public notices they have assumed to themselves the right of issuing to the world as indicatory of their intention not to incur the extent of liability the common law would otherwise object them to, and which have, of late years, been sanctioned by the approbation of the courts, confer upon them the power of relieving themselves from any responsibility occasioned by those extraordinary dangers to which valuable property in their custody might be exposed, unless the reward and compensation was sufficient to remunerate them. These advantages the innkeeper is deprived of; and still it has been stated, that the carrier is entitled to refuse to undertake the charge of the goods tendered to him for conveyance. It is with deference, however, submitted, that he could not, upon a tender of his reward, avail himself of the privilege of becoming such bailee merely as caprice might suggest, or avarice dictate. And besides, viewing what has been just said as sanctioned by principle, it should be remembered, that in practice it would be impossible to lay down a definite rule, of which the public might be apprised, if the deduction from the case of *Edwards v. Sherratt* be correctly stated, as it would rest with the carriers to prescribe to themselves under what particular circumstances they would incur any risk at all, even though they might be indemnified in proportion to the hazard they incurred, as in other cases; and the name of common carriers would only exist in the appellation. Indeed, it has been regretted by some, and perhaps justly, that the ancient and inflexible rules of the common law, which were much more strict and uniform than those at present either adopted or sanctioned by the courts, should have been departed from, and carriers allowed to engraft upon the original system any restriction upon their general responsibility. But the courts felt this, that however just and reasonable it might be that the carrier should insure the goods at all events, without which there could be no public security, it was equally reasonable that he should, in cases of extraordinary risk, have the power of contracting upon extraordinary terms. Although, therefore, as will be hereafter observed, a favourable ear has been lent to the establishment of public notices and special acceptances as safeguards to the interests of carriers; and although the courts have invariably interfered where any circumstances of a fraudulent nature appeared; yet it will be seen that the privilege is fraught with some disadvantages; that the being allowed to make special contracts in some justifiable cases has induced them to encroach upon the undoubted rights of the public; and that carriers, instead of being what they were originally intended, useful and faithful subsidiaries to public commerce, have proved, in some instances, only arbitrary extortioners, and successful evaders of the common law policy

2. Subsequent to the commencement of their journey.

(a 1) Of their obligation to carry safely. (b 2) In general.

1. FORWARD v. PITTARD. M. T. 1785. K. B. 1 T. R. 27. S. P. Hob. 18. S. P. DALE v. HALL. M. T. 1750. K. B. 1 Wils. 282. S. P. COGGS v. BERNARD. T. T. 1703. K. B. 2 Lord Raym. 918. S. P. Holt. 131; S. C. 1 Wils. 281.

Case against a common carrier for not safely carrying and delivering goods. The goods were hops, burnt whilst in a booth under the defendant's care; and although the fire began 100 yards distant, and without any negligence whatever being proved in the defendant, it was held, that there were events for which the carrier is liable, independent of his contract; a further degree of responsibility by the custom of the realm; for by the common law he is in the nature of an insurer; and as the fire arose from some act of man, the carrier is liable in this case, inasmuch as he is liable for inevitable accident. See Lord Raym. 264; Str. 128; Burr. 2300, 2827.

2. TYLY v. MORRICE. E. T. 1698. K. B. Carth. 485. S. P. 1 Ld. Raym. 646; 5 Mod. 455. S. P. Comyns. 100; 12 Mod. 482. GIBBON v. PAYNTON. E. T. 1669. K. B. 4 Burr. 2299.

Case against a carrier for the loss of two bags, said to contain 200*l.* whereon a per centage had been charged for the carriage and extraordinary risk to that amount only. The court held, that the carrier should answer for no more, because his particular undertaking extended no farther, and his reward was only *quoad* that sum; that it was the reward that made the carrier answerable; and since the plaintiffs had taken that course to defraud the carrier of his reward, they had thereby barred themselves of that remedy which was founded only on the reward. See Co. Litt. 89. 4 Co. 84; Owen. 57. 8 Co. 84; Rol. Ab. 2 12; 2. id. 367. Rol. Rep. 79; Bulst. 280; Sid. 36; Mod. 85; Moor 462; Palm. 532; Str. 128; Ld. Raym. 948.

3. LANE v. COTTON. E. T. 1699. K. B. 1 Salk. 143.

Per Holt, C. J. A carrier is liable in respect of his reward, and not of the hundred's being answerable over to him; for the hundred is liable by the statute of Winchester, but he was so at common law; and the reason why robbery did not excuse him was, because it might be by consent and combination, carried on in such a manner, that no proof could be had of it, to the great detriment of the public.

4. FORWARD v. PITTARD. M. T. 1785. K. B. 1 T. R. 27. S. P. RICHARDSON v. SEWALL. 2 Smith. Rep. 205. S. P. 1 Vent. 190. 238; Sir T. Raym. 220; S. C. 1 Mod. 85. S. P. BATSON v. DONOVAN. M. T. 1820. K. B. 4 B. & A. 35. S. P. THOROGOOD v. MARSH. H. T. 1819. C. P. 1 Gow. N. P. C. 105; 2 Chit. Rep. 1.

Per Lord Mansfield. It appears from all the cases for 100 years back, that there are events for which the carrier is liable independent of his contract.

* It is very remarkable, that in the system of the Hindoo laws, the liability of the carrier is precisely similar in effect to the common law of England; see Colebrook's Hindoo Law. It seems probable, that the custom relating to carriers took its origin from the civil law of bailments; this species of bailment being there defined "*contractus quo aliquid gratuito gerendum committitur accipitur.*" Vinn. in Com. Justinian, lib. 3. tit. 27. 684. A similar meaning seems to have been attached to it by Bracton, lib. 3. 100; see 1 Lord Raym. 919. It is pleasing, says Sir William Jones, in his Essay on the Law of Bailments (p. 114); to remark his similarity, or rather identity, of those conclusions which pure unbiased reason, in all ages and nations, seldom fails to draw in such judicial inquiries as are not fettered and manacled by positive institution; and although the rules of the Pandits concerning succession to property, the punishment of offences, and the ceremonies of religion, are widely different from ours, yet in the great system of contracts, and the common intercourse between man and man, the Pootee of the Indians and the Digest of the Romans are by no means dissimilar; See Grotius De Jure Belli et Pacis, lib. 2. cap. 12. s. 13. and Robertson's Disquisition on India, App. 247. 254.

† Hence it will be seen, from a subsequent part of this title, to have been the practice of the Court, in cases where the value of the goods delivered to the carrier has been fraudulently concealed, or misrepresented, to relieve him, upon the ground that such fraud and concealment annulled his contract, inasmuch as his warranty and insurance were in respect of the reward, which could not be, in such cases proportioned to the risk.

A carrier's liability to convey safely what is bailed to him arises out of the custom of the realm, and attaches in all cases of loss, unless occasioned by the act of God or of the King's enemies.*

Another reason upon which this liability is founded is in respect of the carrier's reward;

[83]
And not because he has a remedy over against the hundred.†

A carrier is also looked upon as an insurer.

By the nature of his engagement he is liable for all due care and diligence; and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm, that is, by the common law; a carrier is in the nature of an insurer.

5. BUDDLE v. WILSON. T. T. 1795. K. B. 6 T. R. 369. S. P. DULE v. HALL. M. T. 1750. K. B. 1 Wils. 282. S. P. BORON v. SANDFORD. T. T. 1688. K. B. Carth. 58; S. C. 3 Lev. 268. S. C. 3 Mod. 321; S. C. 2 Salk. 440; POURLE v. LAYTON. M. T. 1806. C. P. 2 N. R. 365; HAMBLY v. TROTT. H. T. 1776. K. B. Cowp. 375; *contra*, GOVETT v. RADVIDGE. M. T. 1802. K. B. 3 East. 63. PARRY v. HANWICK AND HOLDWIN, AND IBBETSON, cited 6. T. R. 371. DICKON v. CLIFTON. M. T. 1776. C. P. 2 Wils. 319; S. C. 5 Mod. 92. n.

But the law has, in all cases, recognized the existence of a contract.*

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To an action against a carrier in case, on the custom of the realm, for not safely carrying goods, the defendant, after a general imparlance, pleaded in abatement, that his partners ought also to have been joined. General demurrer and joinder. The Court expressed a strong opinion that such a plea might be supported if pleaded in time, the cause of action arising, as Lord Holt said, *quasi ex contractu*; but they ordered the case to stand over. Lord Kenyon afterwards said, they were clearly of opinion that the plea in abatement was bad, because pleaded after a general imparlance; but that it might have been supported if it had been pleaded in proper time; and his lordship referred to Mr. J. Dennison's opinion in 1 Wils. 282. who said, that the declaration upon the custom of the realm was the same in effect with the declaration before the Court, (which was that the defendant undertook, in consideration of so much money, to carry the plaintiff's goods from one port to another;) and that in the old forms it was, that the defendant *suscepit*, &c. which showed that it was *ex contractu*.—Judgment of *r. spendcat ouster*.

6. BECK v. EVANS. M. T. 1812. K. B. 16 East. 244.

His responsibility being there fore found not only on the particular nature of his contract, but governed by principles of public policy; he is, on the one hand, liable in case of an express.

Or implied breach of contract;

This was an action on the case against the defendants, as common carriers; for so negligently carrying a cask of brandy that the greater part was lost. It appeared that the waggoner was informed of the cask leaking, but never took any step to prevent it, although he stopped several hours at Birmingham and other places, and only took the cask out when he had other parcels to deliver. The principal ground of defence was, a notice limiting the carrier's responsibility to 5*l*; and Lord Ellenborough, C. J. said—if goods are confided to a carrier, and it is proved that he has misconducted himself in not performing a duty, which, by his servant, he was bound to perform, that is such a misfeasance, as if the goods thereby become damaged, his notice will not protect him from.

7. LYON v. MILLS. T. T. 1804. K. B. 5 East. 427.

Assumpsit against a lighterman for the amount of damage done to yarn by leakage: the defendants by public notice declared that they would not be answerable for any damage, unless arising from the want of ordinary care in the master or mariners, and then only as far as 10 per cent. The Court, avoiding the question as to the validity of the notice, held, that the circumstances of the case did not bring the plaintiff's loss within such agreement; for in every contract for carriage of goods for hire, it is a term of the contract on the part of the carrier or lighterman, that his vessel is fit and tight for the purpose or employment for which he offers and holds it forth to the public. It is the very foundation and immediate substratum of the contract that it is so; the law presumes a promise to that effect on the part of the carrier, without any actual proof; and every reason of sound policy and public convenience requires it should be so.

Such as not providing proper carriages for the convey

8. AMIES v. STEVENS. M. T. 1718. K. B. 1 Stra. 128. S. P. LYON v. MILLS. T. T. 1814. K. B. 5 East. 428; S. C. 1 Smith. Rep. 478.

The plaintiff put goods on board the defendant's hoy, who was a common carrier. Coming through the bridge, by a sudden gust of wind, the hoy sunk,

* Whilst it has at the same time declared the obligation of the carrier to be a public duty, by allowing the plaintiff to vary the form of his action according to the circumstances of the case, and for the greater convenience of the party injured. The permitting him

and the goods were spoiled. The plaintiff insisted that the defendant should be liable, it being his carelessness in going through at such a time; and offered some evidence, that if the hoy had been in good order, it would not have sunk with the stroke it received; and from thence inferred the defendant answerable for all accidents, which would not have happened to the goods in case they had been put into a better hoy. But the chief justice held the defendant not answerable, the damage being occasioned by the act of God; for though the defendant ought not to have ventured to shoot the bridge, if the general bent of the weather had been tempestuous; yet this being only a sudden gust of wind, had entirely differed the case; and observed, that no carrier was obliged to have a new carriage for every journey; it was sufficient if he provided one which, without any extraordinary accident (such as this was,) would probably perform the journey.

ance of the goods; (but it will only be requisite to provide such as would without any extraordinary accident perform the journey.)

9. *THE PROPRIETORS OF THE TRENT NAVIGATION V. WOOD*. E. T. 1784. 3 Esp. Nisi Prius C. 127. S. P. DALE V. HALL. M. T. 1750. K. B. 1 Wils.

282. S. P. COGGS V. BERNARD. T. T. 1703. K. B. 2 Lord Raym. 909.

The proprietors of the Trent Navigation Company undertook to carry goods from Hull to Gainsborough; and the vessel on board which the goods were sunk in the river Humber, by driving against an anchor in the river, and the goods were in consequence considerably damaged. The carrier was holden responsible for the loss, notwithstanding it was objected that the accident was occasioned by the negligence of persons on board a barge in the river, in not having their buoy out to mark the place where the anchor lay. Ashurst, J. observed—the general rule is, that the carrier is liable in every instance, except for accidents happening by the act of God, or the king's enemies; but another rule is now attempted to be set up, which is, that the carrier ought not to be liable where negligence is imputable to him; but no case has been cited to prove this doctrine; and I think that good policy and convenience require the rule to be adhered to, which has hitherto prevailed. It will naturally lead to make carriers more careful in general. If this sort of negligence were to excuse the carrier, when he finds that an accident had happened to goods from the misconduct of a third person, he would give himself no farther trouble about the recovery of them; nor do I think that in this case the carrier is entirely free from every imputation of negligence; his not seeing the buoy ought to have put him upon inquiring more minutely about the anchor.

And on the other, answerable for losses arising from accident;

10. *FORWARD V. PITTARD*. M. T. 1775. K. B. 1 T. R. 27.

In this action, which was brought against defendant, as a common carrier of goods, which had been delivered by the plaintiff to his care, and which had been consumed by a fire, which broke out in a booth contiguous to the place in which the goods were deposited, the jury found a verdict for the plaintiff, subject to the opinion of the Court; in which they stated that the fire, and consequent destruction of the property, took place without any actual negligence in the defendant. The Court, viewing the carrier in the nature of an insurer, and as, therefore, responsible by the common law, even where he might have used all due care and diligence, afterwards gave judgment for the plaintiff.

Even al though the jury find the goods were destroyed without any actual negligence in the defendant;

See 22 Ass. 41; Justin. lib. 3. 15. s. 2. 3. 4. tit. 35. s. 5; Doctor and Student, dial. 2. c. 38. p. 270.

11. *BARCLAY V. HEYGUIN*. E. T. 1783. K. B. Cited 1 T. R. 33. S. P. COGGS V. BERNARD. T. T. 1703. K. B. 2 Lord Raym. 909; S. C. Com. 133; S. C. Salk. 26; 3 id. 11; S. C. Holt. 13; S. C. 3 Lord Raym. 163. S. P. 1 Wils. 281.

This was an action against a master of a ship, to recover the value of some goods put on board his ship in order to be carried to St. Sebastian. It was resisted proved that the ship was broken in' to by an irresistible force in the river Thames, and the goods stolen; yet the defendant was held answerable.

As from ir resistible force;

See 2 Lord Raym. 264; Str. 128; Bur. 2300. 2327.

to be charged in contract as well as in tort, is founded on a clear principle of mutual equity, that there should be a consideration adequate to the risk on the one side, and due precaution and diligence exerted on the other.

Or any other means whatsoever;

12. In the case of all bailees, where no specific agreement has been entered into, the acceptance of a reward would only render them responsible for ordinary negligence (see *ante*, vol. iii. tit. Bailment, in which the degrees of responsibility of different bailees for hire, in general, are fully inquired into.) But as in the case of carriers, this degree of responsibility would not be sufficient to protect the public interests from the fraud of a class of persons who are not entitled to extraordinary confidence, and are exposed to great temptations to be fraudulent, with little chance of discovery; the common law to prevent collusion between carriers and robbers considerably enlarged their liability; (even in some cases beyond what those principles would appear to warrant; see 1 T. R. 32.) and established, that he was liable for events which were independent of his contract, and for all losses arising from any means whatsoever, except occasioned by the act of God, or of the king's enemies.

13. *WOODLEIFE v. CURTEIS*. 1 Roll. Abr. 2. (C) pl. 4; 1 Inst. 89. a. *BARKER v. WARREN*. M. T. 1677. C. P. 2 Mod. 271. S. P. *FORWARD v. PITTARD*. M. T. 1785. K. B. 1 T. R. 27. S. P. *LANE v. COTTON*. E. T. 1699. K. B. 1 Salk. 143. C. P. *COGGS v. BERNARD*. T. T. 1703. K. B. 1 Ld. Raym. 909; S. C. reported in other books, *vide ante*; S. C. *DALE v. HALL*. M. T. 1750. K. B. 1 Wils. 181. S. P. 1 Gow. 115.

Such as robbery.
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In this case it was resolved, that if a common carrier be robbed of the goods delivered to him, he shall answer for the value of them, *for he hath his hire*,* and thereby implicitly undertaketh for their safe delivery; see 9 Ed. 4. pl. 40.

14. *FORWARD v. PITTARD*. M. T. 1785. K. B. 1 T. R. 27.

Or fire.

This was an action of *assumpsit* against the defendant, as a common carrier, for not safely carrying and delivering the plaintiff's goods. A verdict was found for the plaintiff, subject to the opinion of the Court of King's Bench, on the following case. "The defendant was a common carrier from London to Shaftesbury. That on Thursday, the 14th of Oct. 1784, the plaintiff delivered to him, on Meyhill, 12 pockets of hops, to be carried by him to Andover, and to be by him forwarded to Shaftesbury by his public road waggon, which travels from London through Andover to Shaftesbury. That by the course of travelling, such waggon was not to leave Andover till the Saturday evening following. That in the night of the following day after the delivery of the hops, a fire broke out in a booth at the distance of 100 yards from the booth in which the defendant had deposited the hops, which burnt for some time with unextinguishable violence, and during that time communicated itself to the said booth in which the defendant had deposited the hops, and entirely consumed them, without any actual negligence in the defendant. That the fire was not occasioned by lightning." The general question which was agitated was, whether a carrier was liable for the loss of goods occasioned by fire, without any negligence in him or his servants. Lord Mansfield, C. J. delivered the unanimous opinion of the Court, that the carrier was liable.

See Co. Litt. 52. a b; Doctor and Student, dial. 2. c. 38. p. 270; Justinian. lib. 3. 15. s. 2. 3. 4. tit. 35. s. 5; Sir W. Jones, 180; 22 Ass. 41; 1 Roll. Abr. 10. pl. 12; Bro. tit. Action sur le Case, 78; Palm. 548; Winch. 26; 43 Ed. 3. 33; Clerk's Ass. 99; Mod. Ent. 95; Bro. Red. 101.

(b 2) *When it terminates.*

1. *THOMAS v. DAY*. H. T. 1803. K. B. 4 Esp. 262.

The carrier's obligation to carry safely, it has been seen, attaches immediately upon delivery.

In this case, which was an action against a warehouseman for damage done to two packs of linen by the cords breaking, whilst being lifted from the carman's cart, Lord Ellenborough said: until the goods were delivered to the warehouseman, the carman was to be considered as the agent of the person sending them; but when the warehouseman took them into his own hands, the moment he applied his tackle to them, from that moment the carman's liability determined—the damaged packs, being lifted by the crane, were in his

*. The true ground of this decision is not the reward or hire, but the public employment exercised by the carrier, and the danger of his combining with robbers, to the infinite injury of commerce and extreme inconvenience of society. The reward or hire makes the carrier liable indeed for ordinary force, but cannot extend to irresistible violence; see Jones's Law of Bailments, 102.

possession; and although the defendant offered the use of slings, which the carman declined, that will not exempt the warehouseman; he ought to have insisted on the carman's using them, and if he refused, to have repudiated the goods, and refused to accept them. I think he is liable for the loss in point of law. See *Cobban v. Downe*, 5 Esp. N. P. R. 43.

2. *WARDELL V. MOURILLYAN*. M. T. 1798. K. B. 2 Esp. 693.

Case for not delivering, according to plaintiff's direction, an anchor sent by defendant's hoy, but by him left with the wharfinger (at the quay where the hoy usually discharged her cargo,) who had paid the defendant the freight and given him a receipt for the goods delivered; and although it was proved that by the custom the hoymen never trouble themselves about the goods after delivery at the wharf (except in cases of flour,) it was held that such custom did not discharge the hoyman from his implied undertaking to deliver the goods according to the direction. The delivery to the wharfinger was not a delivery according to the direction.

3. *HYDE V THE TRENT NAVIGATION COMPANY*. M. T. 1793. K. B. 5 T. R. 389. S. P. 1 Price. 328

Defendants were common carriers from A. to B. The goods were lodged in a warehouse at B. belonging to C. D., and there consumed by an accidental fire the same night. Distinct charges were made for the carriage and warehouse room, the latter of which defendants received as agents for C. D., and without any share of the profits, and also for cartage from C. D.'s warehouse to plaintiff's warehouse at B. The defendants had formerly delivered the goods in their own cart, but had latterly, with the plaintiff's knowledge, allowed the bookkeepers to receive any profits accruing from such occupation. Defendants were held liable, as the goods remained in their custody, as carriers, the whole time, which was not affected by the arrangement with the bookkeeper. The charge for wharfage and cartage, which the plaintiffs were compelled to pay before defendants would agree to deliver the goods, was considered as decisive to show that in this case the liability of defendants continued until the goods were delivered.

4. *GARSDALE V. THE TRENT AND MERSEY NAVIGATION COMPANY*. E. T. 1792. K. B. 4 T. R. 581.

Defendants undertook to carry goods from Stockport to Manchester, and to forward them thence to Stockport. The property was destroyed by an accidental fire, whilst in the defendant's warehouses at Manchester, where the goods were to have been deposited until an opportunity offered of forwarding them, not for the convenience of the carrier but of the owner of the goods; and it was held, that as they were only common carriers to Manchester, and the delivery not being to be made there, the responsibility of the defendants, as carriers, ceased as soon as the goods were safely deposited at Manchester; their subsequent charge became merely that of warehousemen, which could not be coupled with that of carriers; and not being guilty of latches, there could be no pretence to make the defendants liable for such an accident.

5. It has been frequently made a question in our courts, as will be noticed in a subsequent part of this work, whether a carrier is bound to deliver as well as to carry goods. The universal feeling manifested by the public has always been, that it would be of the most essential service to the community where it established that a carrier's obligation to carry safely did not terminate, until the goods were carried to their place of destination, as many frauds may be practised.

* Carriers are often necessarily obliged to connect different modes of conveyance for goods by land or water. Where in such cases goods are transferred from the original contracting carrier, his liability continues, if such transfer is only necessary to the discharge of his own duty, or the terms of his own contract; and all intermediate persons employed are only regarded as his agents, as porters, wharfingers, warehouse keepers, &c. and in house, that case his liability continues until the goods are actually delivered but where his own undertaking or duty is complete and ended, and the goods have passed according to the direction out of his hands, the owner must look to such third person for a due discharge of all the duties incident to their relative situation, as in the cases of intermediate independent carriers or shippers, receivers, wharfingers, &c. on delivery of the goods to whom the contract on the part of the original carrier is entirely determined.

It therefore follows as a necessary part of such duty, that it can only terminate when he has divested himself of the [88] charge he undertook by the delivery to the consignee;

Either directly;

But, as will be hereafter noticed doubts

[89] whether a carrier is bound in all cases

tised in the delivery as well as in the carriage of them. Nevertheless the Courts have, until lately, deemed in a question of such an indefinite cast, that they have generally refrained from expressing a decided opinion as to the carrier's common law liability in that respect, whenever they were not called upon from the exact terms of the case before them, to come to a conclusion upon the broad and general position. And although there are high authorities to show that the delivery is a component part of the carrier's duty, as a bailee of goods, the cases themselves must be referred to for a complete elucidation of the question, *vide post*, p. 126.

6. **GOLDEN V. MANNING.** T. T. 1772. C. P. 3 Wils. 429; S. C. 2 Bl. 916. S. P. HYDE V. THE TRENT AND MERSEY NAVIGATION COMPANY. M. T. 1793. K. B. 5 T. R. 389.

Where, however, it is the general course of his trade to deliver goods, a delivery will be essential to the completion of his engagement.

Case against the defendants as common carriers, for not carrying and delivering two pieces of silk from B. to the use of the plaintiff, at the house of J. S. in London, and another count on a special agreement to carry and deliver the said silk safely and securely in a reasonable time, and neglecting so to do. Plea to the first count, not guilty, to the last *non assumpsit*. On trial verdict for the plaintiff, subject to the opinion of the Court on this case. The defendants being common carriers from B. to L. received a box containing two pieces of silk, directed to J. S. which came to their warehouse in L. with no legible directions upon it, where it remained for a year; at the end of which, the plaintiff and J. S., settling their accounts, discovered the mistake of this box having been sent by the coach, and never delivered. The plaintiff went to the warehouse, and found the box and a letter of advice from the plaintiff B. to J. S. together with the silks therein. But the silks had received damage to the amount of 29l. 14s. wherefore the plaintiff refused to take the box, and the defendants refused to make satisfaction for the loss. The defendants never gave any intelligence of the arrival of the box, though the name of J. S. (and no more) appeared in their way bill, and his name and place of abode were inserted in a printed directory, kept in the defendant's warehouse; the defendants kept a porter at a stated salary, to carry out goods which come by their coach, and received the portage to their own use. Gould, J. (*absente De Grey, C. J.*) said—there is no occasion to enter, as has been done at the bar, into the general question of the duty of common carriers being bound to deliver, as well as carry the goods. But this case depends on its own special circumstances. The defendants certainly must be understood to have contracted to carry these goods on the same terms, and in the same manner they carried other people's. And it appears that their general course of trade was to deliver goods at the houses to which they were directed, that they received a premium, and kept a servant for that special purpose. This box came directed to their warehouse at B. That the direction was afterwards defaced, was owing to their own neglect. They had J. S.'s name in their way bill, and might have found him out by their directory. Therefore here is a great and palpable negligence on the part of the defendants, who, whether bound to deliver or not by the general duty of carriers, had undertaken so to do by their general course of trade; and indeed I think that all carriers are bound to give notice of the arrival of goods, to the persons to whom they are consigned, whether bound to deliver or not. Blackstone and Nares, Js. were of the same opinion on the circumstances of this case, but avoiding entering into the general question.—*Postea* to the plaintiff.

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7. **CATLEY V. WINTRINGHAM.** T. T. 1792. K. B. Peake. N. P. C. 202.

Such usage of trade, or any other particular custom, being always considered binding;

Lord Kenyon in this case gave effect to the custom of the river Thames, by which it was contended by the plaintiff, that the master of a vessel was bound to guard goods loaded into a lighter sent for them by the *consignee*, until the loading was complete; and could not discharge himself from that obligation by telling the lighterman he had not sufficient hands on board to take care of them; and said—the custom of the river must undoubtedly govern the parties. There might have been a special contract limiting the defendant's duty, but he could not do that by any act of his own without the consent of the other party.

8. WARDELL v. MOURILLYAN. M. T. 1798. K. B. 2 Esp. 693.

Provided it be mutual ly known;

In this case the question of how far the liability of hoymen extends after they have delivered the goods at the wharf to which they ply, was brought before a jury at *nisi prius*. It appeared that goods had been delivered to defendant on board his hoy directed to A. B.; that he was known to ply to a particular wharf, and that he delivered such goods at the wharf; after which they were lost. It was contended that the delivery at the wharf did not discharge defendant, and that his liability did not end till he had delivered them according to the direction. Witnesses were called on behalf of defendant to establish a custom, not to deliver. One of them swore that except in the case of flour, the hoymen never concerned themselves about goods after they had delivered them at the wharf which they frequented; that in general the wharfingers paid the freight, and gave the hoyman a receipt for the goods delivered. Lord Kenyon left it to the jury to say what was the custom; and they found a verdict for defendant.

9. ATKINSON v. GRAHAM. E. T. 1826. C. P. M. S.

This was an action which had been tried at the preceding assizes, where a verdict had been found for the plaintiff. A motion was made for a rule to show cause why the verdict should not be set aside on the ground of its being contrary to evidence, and of a misdirection of the judge. The question was of importance, involving the point, whether a carrier of goods by water, for instance a master or owner of a vessel, was to be put to the expense of taking the goods out of the vessel, or whether the consignee was to be at such cost. The immediate question arose on the carrying of goods from Hull to Wakefield; and at the trial it was contended that at some particular places in the county of York, the expense by custom was thrown upon the master, but it was not shown that the particular custom prevailed at Wakefield. And it was further urged, that the goods were shipped under a general law, and that the bill of lading being in the usual private form, bound the parties to deliver the goods out of the ship. The learned counsel contended, that it was not sufficient to show a custom at a particular place, it should have been shown that it was the custom at the particular port of delivery, to wit, Wakefield.—Rule *nisi* granted.

10. *In re* WEBB AND OTHERS. T. T. 1818. C. P. 2 Moore. 500.

A. B. C. and D. being in partnership as carriers, entered into an agreement with S. and Co. to carry goods for them from London to Frome, where they should be deposited in the warehouse of A. the resident partner, till S. and Co. should be ready to receive them into their own. The goods having been forwarded, were, after they had been deposited in A.'s warehouse, destroyed there by fire. The Court held, that the liability of A. B. C. and D., as carriers, ceased on the arrival of the goods at Frome, and that when they were deposited in A.'s warehouse, they could only be considered as warehousemen, observing—when the goods arrived at their place of destination, the liability of A. and Co, as carriers, ceased; and, by the terms of the agreement, Frome was to be the place of destination. It was also agreed, for the accommodation of all parties, that the goods should remain in the warehouses of A. and Co. till S. and Co. were ready to receive them into their own; the former, therefore, did not retain them there as carriers, but as warehousemen; and if an action had been brought against them in their latter capacity, I think they would not have been liable for the loss in question, as they would, in that case, have been only bound to take the same care of the goods as if they had their own property.

11. STRONG v. NATALLY. E. T. 1804. C. P. 1 N. R. 16. HYDE v. THE TRENT AND MERSEY NAVIGATION COMPANY. M. T. 1793. K. B. 5 T. R. 397. S. P. CATLEY A. WITTRINGHAM. T. T. 1792. K. B. Peake. N. P. C. 150. GOSLING v. HIGGINS. T. T. 1808. K. B. 1 Campb. 459. S. P. 1 Wils. 281.

Buller, J. in making observations on the general liability to deliver goods at the place to which they are directed, said—it does not appear to me that the

As for instance a bill of lading

So where a consignee having no warehouse of his own directs the carrier to let them remain in his waggon of ice until the consignee removes them in such case the carrier's liability ceases on the arrival of the goods at the wagon office.

12. RICHARDSON v. GOSS. E. T. 1802. C. P. 3 B. & P. 127. SCOTT v. PETIT.

T. T. 1803, ib. 472. DIXON v. BALDWIN. E. T. 1804. K. B. 3 East. 181.

ROYE v. PICKFORD. H. T. 1817. C. P. 1 Moore 526.

In this case Mr. J. Chambre said, that he was strongly inclined to think, that if a man were in the habit of using the warehouse of a wharfinger as his own, and make it the repository of his goods, and dispose of them there, that the journey of a carrier, in whose custody they were temporarily placed, would be at an end when the goods arrived at such warehouse.

(c 2) *How limited.** (a 3) *By special acceptance.*

1. TITCHBURNE v. WHITE. H. T. 1723. K. B. 1 Str. 145.

Per King, C. J. If a box is delivered generally to a carrier, and he accepts it he is answerable, though the party does not tell him there is money in it. But if the carrier asks, and the other says no, or if he accepts it conditionally, provided there is no money in it, in either of these cases I hold the carrier is not liable.

A carrier is not in general exempted from a liability accruing from the loss of goods, the quality and value of which had not been specified to him when delivered.

* The manner in which carriers have of late years engrafted upon their common law liability, those rules and limits restrictive of the extent to which they were originally considered liable, has been already slightly noticed. Anciently the carrier used to confine his responsibility by means of a special acceptance of the goods in those cases, wherein it might be inconsistent with the respective situation of the two contracting parties, to undertake the care of them upon the general terms, on account of the peculiar risk of carrying the goods at all, or the great value of them, which might expose them to more imminent danger of losing them than by the usual amount of average carriage they would be sufficiently protected against. It has of late been, however, the custom to effect the same end by means of a general notice, intimating to the public the footing upon which the carrier consents to take charge of the goods, and if the notice is brought home to the knowledge of the employer, it will be considered as equivalent to a special acceptance. It may not be therefore here inappropriate to endeavor to discover upon what grounds this part of our law was originally founded, the reasons for the ancient practice having been departed from, and the view the Courts have taken of the propriety of upholding those recent innovations. The common law liability of the carrier was simple in its maxims, and although in some cases harsh and oppressive upon an individual, was founded on the strongest principles of public expediency, and afforded the best rules, because the more easy to be comprehended by the public. The one party was thereby defended against all positive undertakings bottomed in fraud, and the other secured against the consequences of direct negligence or equivocal honesty. A variety of cases has, however, established, that restrictions of the kind stated in the text are binding upon the public, and shows the mode in which the Courts have given effect to such limitations. The reason which is generally assigned why they are tolerated, and indeed the only ground upon which they can be supported, is, that the carrier who obtains a small reward only for the carriage of goods, should not be held liable to a large amount; and although it was at one time holden in the construction of general notices that such exemptions did not apply to goods of a large bulk and known quality, where the value must be obvious, and that such notices, therefore, though in their terms made to extend to any goods of what nature or kind soever, could not be indefinite, but must be construed with reference to the subject matter and to cases where the carrier had no means of knowing what was the nature of goods committed to his custody although also a loss arising from the personal default of the carrier is not within the scope of such notice, which was meant to exempt the carrier from losses by accident or chance; and although a carrier is liable to carry every thing that is brought to him for a reasonable sum, to be paid for the same carriage, and cannot extort what he pleases; yet as there are but a few parcels, &c. in comparison, of a value below the limit which carriers have fixed, as the extent of their responsibility, it will appear that, except in their being compellable to take the charge of goods as public servants, and the form of action against them grounded on such a relation which an injured party has it still in his power to adopt according to circumstances, no part of the securities or easy remedies contemplated by the ancient common law at present remains wherever the value of the goods falls within the effect of these notices. In whatever manner, nevertheless, it might have been questioned, how far the courts of judicature would have consulted the best interest of our commercial situation, by giving full effect to the severity of those obligations which our ancestors thought fit to establish; such a question at the present day becomes almost useless and futile; for, consi-

2. BATSON v. DONOVAN. M. T. 1820. K. B. 4 B. & A. 31.

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Per Holroyd, J. Persons delivering goods to a carrier are not bound to specify their quality or value. It is the carrier's duty to make inquiry if he either wishes to have a reward proportionate to their value, or to know whether they are goods of that quality for which he has a sufficiently secure conveyance.

It being his duty if he deems it necessary, to make inquiry at the time;

3. MORSE v. SLUE. H. T. 1671. K. B. 1 Vent. 190, 238; S. C. 3 Keb. 72. 112. 35; S. C. 2 Lev. 69; S. C. Rd. 220; 1 Sid. 36; 8 Mod. 178; 11 id. 135; 12 id. 6. 472. 482; 2 Lord Raym. 918; Cowp. 762.

And make a special acceptance, limiting his responsibility;

A person brought a box to a carrier, in which there was a large sum of money, who demanded of the owner what was in it; he answered, it was filled with silks and such like goods of mean value; upon which the carrier took it, and was robbed. The Court held that he was liable. But if the carrier had told the owner that it was a dangerous time, and if there was money in it, he durst not take charge of it; and the owner had answered as before; this matter would have excused the carrier. See Molloy. 209. 230. 239; 1 Rol. Abr. 2; 1 Stra. 145; 4 B. & A. 31; 4 Burr. 2301; Aleyn. 93; B. N. P. 71. a.; 1 M. & S. 261; 5 B. & A. 343.

Which case has been considered for a length of time justifiable;

4. HARRIS v. PACKWOOD. M. T. 1810. C. P. 3 Taunt. 271.

The liability of a carrier who had limited his responsibility, coming before the court, Mansfield, C. J. said—in looking into the books we find the special acceptance much older than I had supposed it to be. And it leads to great frauds, for on account of the number of persons always attending about these open waggon yards and offices, every person standing around is apprized of this or that parcel contains watches or jewels to the amount of many hundred pounds; this is a great inconvenience, but however inconvenient it is, it seems that from the days of Aleyn down to this hour, the cases have again and again decided, that the liability of the carrier may be so restrained.

And has been of late years given effect to by the establishment of general notices, by which the carrier refuses to be liable for articles above a named sum, unless entered and paid for accordingly;

(b 3) By public notices. (a 4) Of their nature in general.

1. The particular limitations various carriers have at different periods chosen to subject the public to the observance of, will be noticed in a subsequent division of this title, *post*, p. 96, where the construction the courts have put upon the terms used in them, will be examined.

2. MAYING v. TODD. T. T. 1815. Guildhall. 1 Stark. N. P. C. 73.

It appeared that the defendant was a wharfinger and lighterman. Certain goods had been accidentally destroyed by fire on his premises, which ought, and was contended by the plaintiff, to have been safely shipped to him, in compliance with an undertaking by defendant to that effect. The defence set up was, that the defendants had so limited their responsibility, that it did not extend to a loss by fire. And although it was submitted that the defendants could not exclude their responsibility altogether, as that was going further than had been done in the case of carriers who had only limited their responsibility to a certain amount. Lord Ellenborough said—Since they can limit it to a particular sum, I think they may exclude it altogether, and that they may say, we will have nothing to do with fire.

Or as has been said, excludes the risk of any loss that may be occasioned by any particular case in this dental carriage all together.

dering the length of time during which, and the extent to which, the practice of making such special acceptances of goods for carriage by land and water has prevailed in this country, under the observation and allowance of courts of justice, and with the sanction and countenance also of the legislature itself (which is known to have rejected a bill brought in for the purpose of narrowing the carrier's responsibility in certain cases, on the ground of such a measure being unnecessary, inasmuch as the carriers were deemed fully competent to limit their own responsibility in all cases by special contract,) considering also that there is no case to be met with in the books in which the right of a carrier thus to limit, by special contract, his own responsibility, has ever been by express decision denied, the right cannot be negatived, however liable to abuse and productive of inconvenience. The legislature, if they think fit, are the only parties to apply a remedy. The exemptions of carriers by reason of notices of this sort has, however been carried to its utmost extent, and the present disposition of our courts is to curtail it. By referring to the cases as abridged above, the peculiar nature of the restrictions which has been imposed in particular cases may be fully ascertained, which renders it unnecessary to enter into a full detail of them in this note.

The legality of these notices, and the policy of adopting them, has been frequently questioned.

And although their introduction has been lamented both by the judges of the Court of [95] King's Bench.

And Common Pleas.

Yet they must be now looked upon as an encroachment upon the common law of the long duration to be impugned,

And have been consequently given effect to in subsequent decisions.

But in all those cases the carrier's stipulations must not be so exorbitant as to amount to extortion. [96]

(b 4) *Of their legality.*

1. *LYON v. MILLS.* T. T. 1804. K. B. 5 East. 428.

In this case it was argued, that a notice given by the defendant, who was a common carrier, limiting his responsibility, was illegal, being calculated to exempt him from a liability cast on him by law. At the close of the argument the Court intimated an opinion that in the determination of that case, it might, perhaps, not be necessary to enter into a consideration of the general question, as to the validity of these notices in point of law, and to what extent, and upon what principles they might be supportable. And they were ultimately of opinion, that admitting the notice given by the defendant to be valid, the circumstances stated did not bring the plaintiff's loss within such agreement.

2. *DOWN v. TROMONT.* T. T. 1814. Sittings at Westminster. 4 Camp. N. P. C. 41.

Per Lord Ellenborough. I am very sorry, for the convenience of trade, that carriers have been allowed to limit their common law responsibility, and some legislative measure upon the subject will soon become necessary. But I feel myself bound by the decision that such notices in cases where they apply constitute a special contract between the parties.

3. *LAWES v. KERMODE.* H. T. 1848. C. P. 8 Taunt. 146.

Per Cur. The doctrine of carriers exempting themselves from liability by notice has been carried much too far. It is to be lamented that it should ever have been introduced into Westminster Hall.

4. *NICHOLSON v. WILLAN.* M. T. 1804. K. B. 5 East. 507; S. C. 2 Smith: Rep. 107.

This was an action against a carrier for the loss of goods. A special notice restrictive of the defendant's liability, was given in evidence, of which the plaintiff was proved to have had notice. A verdict was found, subject to the opinion of the court. Upon the case being brought before them, it was contended on the part of the plaintiff, that such a special acceptance of goods by a common carrier, as was contained in the defendant's notice, was contrary to the policy of the common law, which has made common carriers responsible to an indefinite extent, for losses not occasioned by the only excepted causes of loss; viz. "the act of God and the King's enemies." But Lord Ellenborough, C. J. said, that considering the length of time during which such notices had been in use, and the extent and universality in which the practice of making such special acceptances of goods for carriage, had prevailed in the kingdom under the observation and sanction of the legislature itself, he could not say that such an agreement or notice was contrary to law.

5. From the cases of *Ratson v. Donovan*, 4 B. & A. 21. abridged, post, p. 119; *Bignold v. Waterhouse*, 1 B. & B. 225, abridged, post, p. 122; and *Harris v. Packwood*, 3 Taunt. 264, abridged, post, p. 122; it is clear that the courts have further established the validity of public notices, having decided in those cases that it is an unfair dealing on the part of the plaintiff to refrain from disclosing the value of a parcel, the risk of conveying which, the carrier has taken the precaution to guard himself against, by a public notice, of which the plaintiff was cognizant.

6. *HARRIS v. PACKWOOD.* M. T. 1810. C. P. 3 Taunt. 264. S. P. *BATSON v. DONOVAN.* M. T. 1820. K. B. 4 B. & A. 39. S. P. *HYDE v. PROPRIETORS OF THE TRENT AND MERSEY NAVIGATION.* T. T. 1793. Guildhall. 1 Esp. N. P. C. 37.

Per Cur. There is nothing unreasonable in a carrier requiring a greater sum when he carries goods of greater value; for he is to be paid not only for his labour in carrying; but for the risk which he runs, which is greater in proportion to the value of goods. I would not, however, have it understood, that carriers are at liberty by law to charge whatever they please; a carrier is liable, by law, to carry every thing which is brought to him, for a reasonable sum to be paid for the same carriage; and not to extort what he will.

(c 4) *Of their form and construction.**

* Had carriers, by a general consent, adopted one certain approved legal form of notice to vary their responsibility in extraordinary cases, few rules of construction would have

1. THOROGOOD V. MARSH. H. T. 1819. C. P. 1-Gow. N. P. C. 105.

The notice, out of which the defendant, a common carrier, urged that the restriction of his common law liability arose, was, that "he would not be liable for any plate, watches, jewels, writings, lace, or any article, of more than 5*l*. value, unless entered as such, and paid for accordingly." It appearing that, in this case, the subject matter of the action was the loss of a large quantity of stationary, it was contended that the general effect of the notice did not apply to the case under discussion; as although the words "or any article" were inserted in the notice, they must be confined to articles of the same description, with reference to bulk, as those which preceded that term, and which were contained in a small compass. But Dallas, C. J. said—I do not know how I can restrain the operation of the notice in this manner. The notice is general in its terms; and, from its generality, it includes goods of this denomination.

2 BUTLER V. HEANE. H. T. 1810. London Sittings. 2 Campb. N. P. C. 414.

Per Lord Ellenborough. If a common carrier is to be allowed to limit his responsibility, he must take care that every one who deals with him is fully informed of the limits to which he confines it, and publish to the world such notices as are unequivocal, and admit of no ambiguity.

3. CORDEN V. BOLTON. E. T. 1809. Westminster Sittings. 2 Campb. N. P. C. 108.

This was an action against the proprietor of a coach, to recover the value of a brooch and ring, sent by his coach; in answer to which, evidence was given of an examined copy of a board fixed in the office, stating that the coach owners, &c. would not be liable for jewels, &c. however small in value, unless notice was given, and paid for as such; but it was proved, that in the printed handbill, circulated by the defendant, it was only said generally that they would not be answerable for more than 5*l*. unless, &c. But Lord Ellenborough, C. J. said—the printed paper in circulation dispensed with any necessity to attend to the notice in the office. I have a right to presume, that what is circulated by the carrier's authority, contains the whole of the limitation he intends to put on his common law responsibility, and gives a full statement of the special contract into which he enters with his customers; accordingly the jury were directed to find a verdict for the plaintiff, which they did.

4. MURIN V. BAKER. M. T. 1817. Westminster Sittings. 2 Stark. N. P. C.

255. S. P. GÖUGER V. JOLLY. T. T. 1816. London Sittings. Holt. N. P. C. 317.

It was proved by the defendant, a common carrier, against whom this action had been brought, for the loss of a parcel, that a printed notice had been stuck up in defendant's counting-house, that he would not be accountable for any article (unless entered in the books by the book-keeper, who should give a receipt, which receipt to be considered a general acceptance of the goods,) as in case of loss to subject him to payment, if above a certain weight. It appeared also, that when the goods were delivered, a small paper containing a notice without any such limitations as was contained in the large one, was given to the porter. Lord Ellenborough was of opinion that the defendant having given two notices, was bound by that which was least beneficial to himself. Verdict for plaintiffs to the full amount.

5. LATHAM V. STANSBURY AND OTHERS. T. T. 1822. K. B. 3 Stark. N. P. C.

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This was an action brought against the defendant, as a carrier, to recover the loss of a parcel of bank notes, value 1340*l*. delivered to him to be carried. It was necessary, and few difficulties could have arisen in determining when the circumstances of any case came within those general rules of exception. As they have, however, in general adopted each a peculiar form of notice, the cases have been decided in reference only to, and upon a construction of such particular notices. Hence it seldom happens, that one case affords a parallel or precedent for another, which may arise upon a differently worded limitation. The easiest mode therefore of comprehending their nature and effect, and deriving any certain ground of decision from them, will be by comparing the several notices upon which the courts have been hitherto called upon to decide; *vide supra*.

If after the enumeration of certain commodities the words 'or any article,' are inserted in a public notice, they include all parcels and packages entrusted to the carrier's care.

No general form of notice is, however, used, but its language should in every instance be unambiguous.

As if a doubt arise it will be construed favourably for the public.

Where therefore a notice was given to the person delivering the goods to a carrier which contained a restriction upon the defendant's liability in a few degrees than a notice put up in his office he was held to be bound by the former.

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person delivering the goods to a carrier which contained a restriction upon the defendant's liability in a few degrees than a notice put up in his office he was held to be bound by the former.

When a carrier gives notice that he will answer for the delivery of a parcel,

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When a carrier gives notice that he will answer for the delivery of a parcel,

When a carrier gives notice that he will answer for the delivery of a parcel,

‘fire and robbery excepted,’ and deposited it in his desk, from when it is missed after a short absence of his, he cannot protect himself from an action for its value. •

from L. to D. It appeared that the defendant had placed the parcel in question in a desk in his office, and had left it for a short time, the key remaining in the door, and that on his return the parcel was gone. A general notice had been given that defendant would not be responsible for any parcel above the value of 5*l.* unless entered and paid for accordingly. A number of receipts were also produced in evidence, given by the defendant from time to time upon receiving parcels to be carried up from D. to L., by which it appeared that the defendant engaged to deliver them, fire and robbery only excepted. It appeared that the parcels were never paid for separately but annually. Abbott, C. J. left it to the jury to say whether the defendant received the parcel upon the usual terms, and without any special contract; and if they found a special contract, whether it was a contract to carry the parcel as if insured, or it was a special contract to be responsible, loss by fire, and robbery only excepted. It appeared that the parcels were never paid for separately but annually. Abbott, C. J. left it to the jury to say whether the defendant received the parcel upon the usual terms, and without any special contract; and if they found a special contract, whether it was to carry the parcel as if insured, or it was a special contract to be responsible, loss by fire, and robbery only excepted; and he observed that it was probable that the terms on which parcels were put down were the same as those on which they were sent up; and he directed them, if of that opinion, to find a verdict for the plaintiffs, being clear that the loss could not be occasioned by a robbery within the exceptions of the contract. The jury found that the defendant received the parcel under a special contract to carry the notes, and to be liable, loss by fire and robbery only excepted; and that the loss was not by robbery.

6. COVINGTON v. WILLAN. E. T. 1809. C. P. 1. Gow. N. P. C. 115.

But a loss by robbery is covered by a notice guarding against loss or damage of goods, unless proportionably insured. •

Action against defendant, as a common carrier, for loss of property entrusted to his care, to carry from A. to B. Defence, that plaintiffs had had knowledge of a notice issued by defendant, purporting to protect him against any loss or damage of any property, unless the terms of the notice had been complied with, which it was proved had not been done in this case. But it appearing that the loss was by robbery, it was urged that a robbery was neither a loss nor a damage within the meaning of this notice.

Per Cur. In promulgating this notice to the world, the carrier must be supposed by the terms losses or damages, to intend to convey the idea that he will not, where the saving clause of this notice has not been complied with, answer for those losses which he would be otherwise liable for. Now he is, in general, responsible in all cases, excepting losses by the act of God, or the king’s enemies, consequently for a loss by robbery. A verdict must be, therefore, found for defendants.

7. CLAY v. WILLAN. M. T. 1789. C. P. 1 H. Bl. 298. S. P. NICHOLSON v. WILLAN. M. T. 1804. K. B. 5 id. 507. S. C. 2 Smith. Rep. 107. S. P. HARRIS v. PACKWOOD. M. T. 1810. C. P. 3 Taunt. 264. S. P. HUTTON v. BOLTON. 1 H. Bl. 299. n.

Whereas carrier gives notice that he will not be answerable for certain valuable goods if lost of more than the value of 5*l.* unless entered and paid for as such, he is not liable even to the extent of the 5*l.*

So where the intimation was in these words: ‘Take notice that the proprietors

The plaintiff sent a quantity of light guineas to be carried by the defendant’s stage-coach from Wakefield to London. The defendant’s had published a printed paper, setting forth that cash, &c. would not be accountable for, if lost, of more than 5*l.* value, unless entered as such, and a penny insurance paid for each pound value when delivered to the book-keeper, or other person in trust; notwithstanding which, two pence only was paid for the booking, and 2*s.* for the carriage. At the trial the plaintiff was nonsuited; but a rule was afterwards granted to show cause why the nonsuit should not be set aside, and a verdict entered for the plaintiff, on the ground that he was entitled to recover as far as 5*l.* by the printed conditions; and on the argument, it was insisted for the plaintiff, that he was entitled to recover either the 5*l.* or the 2*s.* 2*d.*; but the court declared that the sense of the printed conditions seemed to be, that the defendants were not liable to any extent, unless the parcel had been entered and paid for as valuable and therefore the rule was discharged.

8. IZETT v. MOUNTAIN. M. T. 1803. K. B. 4 East. 371; S. C. 2 Smith. 107.

A notice, limiting defendant's responsibility as a common carrier, was relied upon. The terms of it were as follows—"Take notice that the proprietors, &c. at this office will not be accountable, &c. for any package or goods whatever, if lost or damaged, above the value of 5l., unless insured and paid." The court said—that they could not help giving effect to those terms in the notice, by which, inasmuch as the goods in question were above the value of 5l. and not insured or paid for at the time of delivery, the defendants could not be held accountable at all.

9. CLARKE V. GRAY. T. T. 1805. K. B. 6 East. 564; S. C. 2 Smith. Rep. 642. 8. P. YATE V. WILLAN. M. T. 1802. K. B. 2 East. 128.

This was an action of assumpsit brought against the defendants, as proprietors of the True Briton stage-coach from London to Market Harborough, to recover the value of goods belonging to the plaintiff, and sent with the plaintiff's wife as a passenger in that coach, and lost in the course of their conveyance. The declaration was in the usual form, against carriers for losses by negligence. The loss was admitted. On the part of the defendants it was given in evidence, that they had, for 12 or 14 years past, given notice by a board in their coach-office, hanging up over the place where the book-keeper sat; and where places for the coach were taken, parcels received, &c. as follows—"take notice that no more than 5l. will be accounted for, for any goods or parcels delivered at this office, unless entered as such, and paid for accordingly." The goods lost were admitted to be above the value of 5l.; and a verdict was taken for the plaintiff, subject to the question, whether the special contract created by the terms of this notice, and by which the responsibility of the carriers was limited, so as not to exceed the sum of 5l. unless where goods were entered and paid for as of an higher value, should have been stated in the declaration. The court expressed their opinion in favour of the plaintiff, and held that he was entitled to retain his verdict for 5l., the limited amount of damages recovered under the contract.

(d 4) Of their communication. (a 5) How communicated. (a 6) In general.

1. GIBSON V. PAYNTOX. E. T. 1769. K. B. 4 Burr. 2298.

This was an action against a common carrier for money sent by his coach, and lost. It was hid in hay in an old nail bag. The bag and the hay arrived safe, but the money was gone. An advertisement, limiting defendant's responsibility, had been inserted in the local newspaper, although it was not distinctly proved that the plaintiff had ever read the advertisement. It was notorious in that country that the price of carrying money was threepence in the pound, which plaintiff had not paid. A letter of the plaintiff's was produced, from which it manifestly appeared that he knew the course of the trade, and that money was not carried at the common and ordinary price of the carriage of other goods; and it likewise appeared from this letter, that he was conscious that he could not recover by reason of this concealment. The jury found a verdict for the defendant. A rule nisi had been obtained for a new trial. Mr. Justice Aston, who tried the cause said—I have no doubt about the justice of the case; my difficulty only has arisen from the cases and authorities which have been mentioned, which put me upon more caution in admitting the evidence. But it appears to be notorious in the country where the transaction happened, that the price of carrying money was threepence in the pound; and it manifestly appears that this was money sent under a concealment of its being money. The true principle of a carrier's being answerable is the reward. And a higher price, ought, in conscience, to be paid to him for the insurance of money, jewels, and valuable things, than for insuring common goods of small value. And here, though it was not directly and strictly brought home to the plaintiff that he had a clear certain knowledge of the defendant's advertisement and handbills, yet it was highly probable that he must have known of them; and his own letter showed his being conscious that he could not recover by reason of the concealment; therefore, I think the verdict against him ought to stand. The rest of the court unanimously agreed with his Lordship and discharged the rule.

&c. will not be accountable &c. for any goods, &c. above the value of 5l. unless, &c. the defendant was

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boldern completely released from any liability whatever.

But where the terms of the notice were 'take notice that no more than 5l. will be accounted for, for any goods or parcels delivered at this office, unless entered as such, and paid for accordingly,' the plaintiff was allowed to retain a verdict given for 5l.

There need not be any direct or immediate communication of a general notice

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If the means adopted are such from whence a jury may reasonably infer that a knowledge of its contents was conveyed to the person dealing with the carrier.

2. EVANS v. SOULE. M. T. 1813. K. B. 2 M. & S. 1. S. P. CLAY v. WIL-
LAN. M. T. 1790. C. P. 1 H. Bl. 298.

This was an action against a common carrier for loss of goods. A verdict was found for the plaintiff, subject to the opinion of the court. It appeared that defendant was the successor of a party who had carried on the same business; that the former carrier had inserted in the newspaper a notice limiting his responsibility; that a copy of this notice was likewise kept hung up in a conspicuous part of the defendant's office, which was the same office where the business had been carried on; and that the plaintiff had, before the time when the goods were shipped, had notice of its contents; that goods belonging to the plaintiff had been sent by other stages belonging to the defendant, and that these goods had been occasionally damaged, in which instances, allowances had been made for the loss accruing to the goods by the defendant to the plaintiff; which, by the terms of the above notice, he need not have done. The court, in delivering judgment, said—the case does not state on those occasions there was an absence of all negligence; and if it did, would it amount to more than this, that the defendant carelessly settled his accounts? He might think that some negligence had taken place, and might, therefore, make an allowance, but that will not stop him on all future occasions; it is a strong circumstance that the notice was continued hanging up in the same office where the defendant's predecessor formerly carried on the business; it must be taken therefore as an adoption of the same course of business.

Thus notice to the vendor of goods that the carrier by whom he sends them limits his responsibility is equivalent to notice to the vendee who

3. MAVING v. TODD. T. T. 1815. Guildhall Sittings 1 Stark. N. P. C. 72.

The question in this case was, whether a notice by a carrier, limiting his responsibility, communicated to the vendor of goods, bound the vendee. Lord Ellenborough said—the vendee is bound by the acts of the vendor and his agents, and if his conduct has been improper, the vendee must resort to him for his remedy.

directs them to be sent.

4. CLARKE v. HUTCHINS. M. T. 1811. K. B. 14 East. 475.

The former having in such cases an implied authority to insure the goods as may be necessary. So if an agent send a parcel by a common carrier; who has previously given a notice restrictive of his liability to the principal, the carrier is not responsible, though the agent was not apprized of such notice.

The Court in this case held, that a tradesman at one port receiving an order to forward goods to a person at another port, by a common carrier, does not sufficiently perform the order by depositing the goods at the receiving house of such carrier, with directions to be forwarded to their place of destination, if the goods being much above the value of 5*l.* to which the carrier's liability was notoriously limited, be not specially entered and paid for accordingly; for such tradesman has an implied authority, and it is his duty to pay any extra charge necessary to insure the responsibility of the carrier to the party from whom he received the order, though only general in the terms of it; and in case of non-delivery by the carrier, whose responsibility was lost for want of such special entry and payment, the tradesman cannot recover the value of the goods against the person from whom he received the order.

5. MAYHEW v. EAMES. H. T. 1825. K. B. 3 B. & C. 601; S. C. 5 D. & R. 484; 1 B. & P. N. P. C. 550. S. P. ALFRED v. HORNE. E. T. 1822. K. B. 3 Stark. N. P. C. 136.

This was an action brought against a carrier by a principal whose agent sent a parcel of notes, 87*l.* by defendants who had given previous notice with other parcels to principal that they would not be accountable beyond 5*l.* for goods sent. This was proved, but there was no evidence that agent had notice. Abbott, C. J. was of opinion that the principal should have instructed agent to the same effect; the plaintiffs were nonsuited, with liberty to them to move to enter a verdict for 87*l.* A motion was made accordingly.

Per Cur. Carriers are responsible at common law; but they limited this responsibility by making a special contract, that is, by public notice. They must prove parties sending to have had notice, and notice in this case to principal is notice to agent. The carrier is consequently protected from loss, although the parcel was sent by agent.

6. ROSKELL v. WATERHOUSE. H. T. 1819. Westminster Sittings. K. B. 2 Stark. N. P. C. 461.

So an acquiescence in the loss

This was an action against a carrier for not taking care of, and safely carrying, goods according to his promise. A witness gave evidence that he had been in the habit of sending parcels to the plaintiff by the same conveyance, and that two boxes which had been formerly sent at different times had been lost, and that after these losses, the plaintiff had brought no action to recover the amount from the defendant, but had directed the witness for the future to insure the parcels which he sent. Abbott, *Ld. C. J.* intimated his opinion, that this would be evidence against the plaintiff, to show that he knew that the defendant limited his responsibility, unless a higher rate was paid for the carriage of the goods by way of insurance.

7. *DAVIS v. WILLAN*. M. T. 1817. Westminster Sittings. 2 Stark. N. P. C. 219. S. P. M. T. 1790. *CLAY v. WILLAN*. C. P. 1 H. Bl. 298.

Abbott, *J.* in his address to the jury in this case, which was an action against the defendant as proprietor of a mail coach, for loss of money, bills, and notes, carried by defendant from S. to L. and in which defendant relied on a notice of being stuck up in the office, but which the party who delivered the goods could not read; in observing upon the inefficacy of such a notice, since it gave no information to the party; and explaining to the jury the necessity of a special contract to be proved on the part of the defendant, in order to relieve himself from his responsibility at common law, observed—in order to avail himself of such a limitation, it is essential that he should bring the knowledge of it plainly and clearly to the mind of the party who deals with him, that he intends so to limit his liability.

8. *CLARK v. GRAY*. E. T. 1802. Guildhall Sittings. 4 Esp. N. P. C. 177.

In an action against a common stage coach proprietor, for loss of goods, defendant gave in evidence a public notice to the following effect—"Take notice, no more than 5*l.* will be accounted for any goods or parcels delivered at this office, unless, &c." which had been circulated by means of handbills, and a large board put up in the office. It was, however, said, that it did not appear that the plaintiff was apprized of this notice, or knew of it in any way whatever, but it was mentioned that Judge Buller had laid it down, that all the coaches in the kingdom had adopted a general notice, and that it was the duty of the passengers to make the enquiry. Lord Ellenborough said—carriers are subjected to losses by the general law of the realm; I therefore think that every man must discharge himself by notice given by himself, and that it was incumbent on him to prove that such notice was given in this case.

(b 6.) *By notices in public offices.*

1. *BUTLER v. HEARNE*. H. T. 1810. London Sittings. 2 Campb. N. P. C. 415. S. P. CLAYTON v. HUNT. T. T. 1811. Westminster Sittings. 3 Campb. N. P. C. 27.

In this case it appeared that there was a notice by the defendant, a common carrier of goods, communicated by a handbill nailed upon his office door, stating, in large print, the many advantages belonging to defendant's waggon, and in a very small character at the bottom, that the owner would not be answerable for goods above the value of 5*l.* unless entered as such and paid for accordingly. Lord Ellenborough, in addressing the jury, said: this is not enough to limit the defendant's common law liability. For how can it be inferred from the notice nailed on the door, which called the attention to every thing that was attractive, and concealed what was calculated to repel customers, that when the goods were delivered, the plaintiff, or his agent there, saw or had ample means of seeing the terms on which the defendant carried on his business.—Verdict for plaintiff.

the bottom of it; he must make good any loss incurred.

2. *CLAYTON v. HUNT*. T. T. 1811. Westminster Sittings. 3 Campb. N. P. C. 27.

In this case, the defendant, against whom an action had been brought for nonfeasance, in the performance of a contract, as a common carrier, relied upon a notice that he would not be liable for any package above the value of 5*l.* unless, &c. It appeared that such notice was contained in a printed bill

sent by a carrier who had published a general notice, and a direction to the person sending the parcels to insure them for the future, would be evidence to show a knowledge of the notice. [102] But the carrier must at his peril take care that the exact limits to which he intends to confine his responsibility are fully divulged; As a general usage of trade is not evidence for that purpose. In conformity with the preceding general rules it has been held on, that where a notice stuck up in the office is fixed in some conspicuous part in a large and legible characters, but the restriction upon the carrier's responsibility is stated in small characters at [103] So also where the goods are not delivered at the office where the notice

is exhibited stuck up at the public office, and in cards circulated about the place where the business was transacted, and the plaintiffs lived, and in the local newspapers. No evidence was, however, adduced, connecting the notice with the plaintiff; nor was there any notice on the cart, which, it was proved, went round to receive plaintiff's goods. Lord Ellenborough held the defendant liable, and plaintiff accordingly had a verdict.

3. *GAUGER V. JOLLY*. T. T. 1816. London Sittings. Holt N. P. C. 317. S. P. BUTLER V. HEARNE. H. T. 1810. London Sittings. 2 Campb. N. P. G. 415.

Or at an intermediate stage between two places, from each of which the carrier conveys goods to the other although notices are suspended at the two termini.

The defence offered to do away with a right of action for the loss of goods by a common carrier, which would otherwise have existed, was, that a public notice confined his liability within certain limits. The notice was, however, only made known at the *termini* of the defendant's journey; but not at the intermediate stage at which the goods in question had been delivered. The defendant's counsel urged that this was sufficient. But Gibbs, C. J. said: the carrier is responsible, unless express notice be brought home to the plaintiff. But a notice of a certain limitation upon his general responsibility, suspended at his offices, at the termination of the journey, will not attach upon the delivery of goods at an intermediate place, where no notice is stuck up. Goods delivered at such places come under his general responsibility; and he is answerable for their loss.

In the same manner the notice will be unavailing, if the person delivering the goods does not in fact read the notice, whether from an omission;

4. *KERR V. WILLAN*. H. T. 1817. Guildhall Sittings. 2 Stark. N. P. C. 53.

In order to affect one who sent goods by a carrier, with notice of the terms on which he dealt, it was contended, that it was sufficient to show that a printed notice was exhibited in the carrier's office, where the goods were delivered by a porter, although the porter could read, and had seen the notice, but had in fact, never read it, not supposing there was any thing upon it. But Lord Ellenborough said: you cannot make this notice to this non-supposing person; it is difficult to struggle with the common law; and it is incumbent upon a person who wishes to rid himself of his responsibility at common law, to give effectual notice. This he may do by giving notice in the public papers; or by any other medium by which the party with whom he deals is effectually apprized of the terms upon which he proposes to deal.

5. *DAVIS V. WILLAN*. M. T. 1817. Westminster Sittings. K. B. 2 Stark. N. P. C. 279.

Or from an inability to read.

And as a general rule carriers should fix the notice in their offices in such a conspicuous situation that it must attract the attention of the party delivering the goods, unless he be guilty of wilful negligence. It has been said that a notice inserted in the Ga-

The question which arose in this case was, whether a notice given by a common carrier, limiting his responsibility, and stuck up in the office was sufficient, where it appeared that the party delivering the goods could not read. Abbott, J. said—it has been the most usual course with carriers to circumscribe their liability by putting up a notice in the office; but it may happen that the party cannot read, and if it so happen, it is the misfortune of the carrier, or his fault, that he does not communicate his intention by some other means; the book-keeper may inform him. I think, that notice has not been sufficiently brought home to the knowledge of the party. The defendant had a verdict.

6. *CLAYTON V. HUNT*. T. T. 1811. Westminster Sittings. K. B. 3 Campb. N. P. C. 28. S. P. BUTLER V. HEARNE. H. T. 1810. London Sittings. 2 Campb. 415.

In this case, the facts of which have been already noticed, *ante*, p. 103, a verdict had been given for the plaintiff. In the ensuing term the Court refused a rule to show cause why there should not be a new trial, saying, that the notice in the office ought to be in such large characters that no persons delivering goods there, can fail to read it without gross negligence.

(c 6) *By the gazette or newspapers.*

1. *LEESON V. HOLT*. H. T. 1816. Westminster Sittings. 1 Stark. N. P. C. 186.

A carrier, in order to free and exonerate himself from that responsibility which would have otherwise attached to him at common law, for the negligent conveyance of certain chairs which had been entrusted to his care, to be carried from A. to B., relied at the trial upon the fact that a notice intima-

ting that all packages of looking glass, plate glass, household furniture, toys, &c. were to be entirely at the risk of the owners as to damage, breaking, &c. and to bring it home to the plaintiff; evidence was adduced tending to show that besides such notice having been placed in a conspicuous situation over the office door, (to rebut which the consignee of the goods on the other side swore he had not seen such notice) a similar notice had been inserted in the Gazette. Lord Ellenborough said that he would receive evidence of the advertisement in the Gazette, but that unless it were proved that the party was in the habit of reading the Gazette the evidence would be of little avail. evidence without proof that the plaintiff was in the habit of reading the Gazette.

2. **MUNN v. BAKER.** M. T. 1817. Westm. Sittings. K. B. 2 Stark. N. P. C. 255.

In an action against a carrier for the loss of a parcel, a notice which would have absolved him from liability, was endeavoured to be established by proof that it had been published in the Gazette; but Lord Ellenborough was of opinion that this evidence could not be received, without proof of the plaintiff having read the Gazette, since he might be expected to look into the Gazette for notices of the dissolution of partnerships, but not for notices by carriers of the limitation of their responsibility. See 5 T. R. 436. 413; Quelch's case, 8 St. Tr. 212; Foster Disc. ch. 2. s. 12. P. 219. Thelluson v. Coslin, 4 Esp. N. P. C. 266; Rex v. Withers, cited by Buller. C. J. 5 T. R. 446; 4 M & S. 546; Kirwan v. Cockburn, 5 Esp. N. P. C. 233; Rex v. Gardner, 2 Campb. 513; Graham v. Hope, Peake, N. P. C. 154; Doe dem. Waitham v. Miles, 4 Campb. 373; 55 Geo. 3. c. 108. s. 36.

3. **LEESON v. HOLT.** H. T. 1816. Westminster Sittings. 1 Stark. N. P. C. 186. S. P. GIBBON v. PAYNTON. E. T. 1769. K. B. 4 Burr 2299.

In this action, which was against a carrier for negligence, the defendant attempted to read in evidence an advertisement in the Times newspaper, by which he limited his responsibility, without first proving that the party was in the habit of reading that paper. But Lord Ellenborough said—that the advertisement in the Times was not admissible at all, without proof that it was taken in by the party. The first instance in which such evidence was received, was a case where a person to entitle himself to a more extended lien, than the common law allowed, inserted a notice in a provincial Sunday paper, and the court held that it was admissible in evidence, because it was probable that the party had seen it, since he took in the paper, and the advertisement related to his business.

(d 6) *By handbills.*

CORBEN v. BOLTON. E. T. 1809. Westminster Sittings. 2 Campb. N. P. C. 107. S. P. BUTLER v. HEARNE. H. T. 1810. London Sittings. 2 Campb. 415.

Case against the proprietor of a coach, to recover the value of a broach and ring sent by his coach, to meet which, evidence was given by an examined copy of a board fixed in the office, stating that the coach-owner's, &c. would not be liable for jewels, &c. however small the value, unless notice was given and paid for as such; but it was proved that in the printed handbill circulated by the defendant, it was only said generally that "they would not be answerable for more than 5l. unless, &c." Lord Ellenborough said—the printed papers in circulation dispensed with any necessity to attend to the notice in the office. The goods being under 5l. value, the loss was the only point for the jury.

(b 5) *At what time communicated.*

GOUGER v. JOLLY. T. T. 1816. London Sittings. C. P. Holt. N. P. C. 317. S. P. BUTLER v. HEARNE. H. T. 1810. London Sittings. K. B. 2 Campb. N. P. C. 415.

Gibbs, C. J. in this case said—It has been holden by Lord Kenyon, that

* Where the jury had found for the plaintiff to the amount of the loss sustained, the Court refused a new trial, on the ground of it having been proved that he had taken in for several years a newspaper, in which the defendant's notice limiting his responsibility had been constantly advertised, and observed that the carrier was bound to fix, upon his employer, a knowledge of such notice; 3 Brig. 2.

But this doctrine has been since controverted. And such a mode of circulating a notice has been assimilated to the case of a publication of a notice in a newspaper, in which instance a habit of reading the paper must be established before a knowledge of the notice can be inferred from its production.*

A carrier's liability may be also qualified by the circulation of a notice by means of handbills.

[106] A knowledge of the notice must be brought home to the party at the time he delivers his goods; it will not suffice that he becomes subsequently acquainted with its contents.

And the carrier must be cautious not to do any act that may amount to a waiver of the notice, but a carrier entitled to the benefit of his notice does not waive it altogether, by at times paying for goods lost or damaged, without making further inquiry.

(e 4) *Benefit of, how waved or destroyed.* (a 5) *In general.*

EVANS v. SOULS. M. T. 1813. K. B. 2 M. & S. 1.

Per Cur. In all those cases in which a common carrier of goods issues public notices to the world, restrictive of his general liability, he must be cautious not to do any act by which the notice may be waved; for if so, he will lose the benefit to which he would be otherwise entitled. A carrier entitled to take advantage of the limitations imposed on his responsibility as a servant of the public, does not, however, deprive himself of such immunity by making a compensation for goods lost or damaged to the party to whom they belonged, without inquiry whether it was occasioned by the negligence of the servants. This is but carelessly settling his accounts. He may wave a right *pro hac vice*, without abandoning it altogether.

(b 5) *By misfeasance or negligence.*

1. GARNETT v. WILLAN. M. T. 1821. K. B. 5 B. & A. 56.

The meaning of the words "lost or damaged," usually inserted in notices given by carriers, was ably explained in this case by Bayley, J., who expressed himself in effect as follows:—In their largest sense they would comprehend any case where the goods were lost or damaged by the wilful act of the carrier, or of his servant, even if he threw away the parcel entrusted to his care. It seems to me, however, that that is not the fair and reasonable construction of those words in this notice. Such a construction would certainly be wholly inconsistent with several decided cases. The true construction of the notice seems to me to be this; that the carrier is not to be protected by the words lost or damaged, if he divests himself wilfully of the charge of the parcel entrusted to his care, because he thereby divests himself of his character of carrier of the things entrusted to his care.

2. BIRKETT v. WILLAN. H. T. 1819. K. B. 2 B. & A. 356.

A counterfeited order for a quantity of cochineal having been sent to the plaintiffs by a letter signed in the name of J. Worthy, and dated Exeter, they, having had previous dealings with a person of that place of the name of Jonathan Worthy, accordingly executed the order, and delivered a box, containing the article in question, to the book-keeper at the defendants' office. The coach reached Exeter on Saturday, and on that evening a person inquired if such a box had arrived, and was told that parcels were not sent out on Sunday; but that it might be had by being sent for. On Sunday night a labouring man called at the coach office, and asked for Mr. Worthy's box, and, upon being asked by whom he was sent, he replied he did not know the person, but it was a man in the street. The book-keeper observing he had two packages for Mr. Worthy, the one, a box, and the other, a small parcel, the man replied, that he had money to pay only for the box, but that he would ask the person who sent him for money for the other. He went out for that purpose, and on his return declined taking any thing but the box, which was accordingly delivered to him. The defendants proved that a public notice not to be liable for packages of this description, without an additional premium, was fixed in their office; but the porter who carried the parcel to the office swore that he did not see the notice, and it was not proved that the plaintiffs themselves had any knowledge of the contents of such notice. The defendants, however, having obtained a verdict, a new trial was granted upon the ground of misdirection upon the question of gross negligence; the learned judge (Abbott, C. J.) having directed the jury, 1st, that if they believed the plaintiffs knew the contents of the notice, that then they should find a verdict for the defendants; but, 2dly, if they did not believe that the plaintiffs were acquainted with the terms of the notice, that then they should consider whether there had been any want of care in the defendants having delivered the parcel to the person who came for it; whereas, assuming that the defendants were guilty of gross negligence, the defendants were still liable, notwithstanding their notice; and therefore the two questions ought to have been left distinctly, and separately, to the jury; and Abbott, C. J. observed, that although of a different opinion at

And as the terms 'lost or damaged' inserted in public notices must in every instance be

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understood with this qualification, that the carrier does nothing either by his own voluntary act or the act of his servants, to divest himself of the charge of carrying the goods to their place of destination;

If the loss arise from a misdelivery of the goods, the notice will be of no avail.

the trial, he was not now upon consideration so clear upon the point; and, as the case of *Bodenham v. Bennett*, (p. post 114.) was an authority in support of the rule which had been obtained, he thought there ought to be a new trial.—Rule absolute. See 3 Campb. 527; 1 Price, 280; 16 East. 244.

3. *DUFF v. BUDD* H. T. 1822. 3 B. & B. 177; S. C. 6 Moore. 469.

Plaintiffs having received an order from a stranger to furnish J. Parker, of High-street, Oxford, with goods, and finding, upon inquiry, that Mr. Parker, of the High-street, was a tradesman of respectability, forwarded the goods by a carrier, having directed them to J. Parker, High-street, Oxford. On the arrival of the parcel at Oxford, the carrier's porter there, who knew W. Parker, of the High-street, (and who was accustomed to deliver parcels at the houses of the consignees;) told him of the arrival of the parcel, no other Parker residing in that street. W. Parker said he expected no parcel. A person to whom the porter had before delivered parcels, under the name of Parker, called at the defendant's office shortly afterwards, and saying the parcel was his, was allowed to take it on paying the carriage, there being many persons of that name at Oxford. The plaintiffs having thus lost their goods, desired the defendant, by letter, to apprehend the person who had taken them if he again presented himself, and afterwards said, that they had done with the defendant, if the man who had the parcel were produced. A notice was suspended in a conspicuous part of the defendant's office, limiting his responsibility to 5l. except where articles were entered according to their value, and the parcel in question had not been so entered, though worth 89l.; but the plaintiff's porter swore he never saw the notice. The plaintiffs having sued the carrier, and the judge having directed the jury that the carrier's negligence had been such as to render it unnecessary to consider the question as to the notice, touching the limited responsibility, and a verdict having been found for the plaintiffs, the court refused to grant a new trial, which was moved for on the ground that the question touching the notice ought to have been considered; that the judge ought to have pointed the attention of the jury to the plaintiff's letter directing the carrier to apprehend the cheat, and the subsequent conversation thereon; and that the property of the goods had passed out of the plaintiffs; and observed, that the chief ground of the application was, that although the judge before whom the cause was tried, stated the main facts to the jury at the trial, yet that he did not detail to them every minutiae of evidence with respect to the notice, and distinctly point out to them the circumstances which transpired subsequently to the delivery of the parcel, and which were disclosed by the letter of the plaintiff, and his subsequent conversation; but that was unnecessary. The only question was, whether the defendant had been guilty of gross negligence in the delivery of the parcel; and the judge, therefore, deeming the facts disclosed to amount to gross negligence, upon the ground that the person who delivered the package in question should have at least inquired what authority the person claiming it had to receive it, and correctly noticing, that if the defendant, under the pressure of the evidence that had been brought forward, were not to be considered guilty of gross negligence, there would be an end of carriage for hire, as no one would be safe if a carrier might deliver a parcel to a person of whom he was altogether ignorant, and whose residence was unknown to him, when he must have well known the person to whom it was directed not only by name but by residence, and who had informed the porter, in the morning, that he did not expect any parcel, with the utmost propriety left the point of negligence, and that alone, to the jury; and, in concluding his address to them, stated, in the terms of his brother Best, in the case of *Batson v. Donovan* (4 B. and A. 30,) that it was the duty of the defendant and his servants to take the same care of property committed to his charge that a prudent man would take of his own. Rule refused. See 5 B. and A. 53; 342; 1 T. R. 27; 4 Price. 31; 2 B. and A. 356. 358; 4 B. and A. 35; 8 T. R. 330.

4. *HYDE v. THE TRENT AND MERSEY NAVIGATION COMPANY*. M. T. 1793. K. B. 5 T. R. 389.

It would seem, that in those cases in which a carrier would be bound to deliver goods, that where he is guilty of a breach of contract in that respect, he

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Although the carrier may have taken subsequent steps with a view to detect the fraud under which they had been misdelivered.

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So the non delivery of a parcel within a reasonable

time is a misfeasance, for which the carrier always remains liable.

So where the goods were sent by a different coach from that in which two persons in partnership as carriers undertook to convey them.

would be responsible to the owner for any damage occasioned thereby, even although he might have given a general notice confining his responsibility within certain limits. See 5 T. R. 389; 3 Wils. 429. and 2 Bl. 916; Alleyne. 93; Owen. 57; 2 Esp. 693; 5 Esp. 41; Peake. N. P. C. 140; 1 B. & P. 16; 1 Campb. 451.

5. *SLEAT V. FAGG*. H. T. 1822. K. B. 5 B. & A. 342.

A parcel containing country bankers' notes of the value of 1300*l.*, and addressed to their clerk, in order to conceal the nature of its contents, was delivered to a carrier, without any notice of its value, to be carried by a mail-coach, and was accepted by him to be so carried. The parcel was sent by a different coach, and was lost. The carrier had previously given notice that he would not be answerable for any parcel above 8*l.* in value if lost or damaged, unless an insurance were paid. No insurance was paid in this case. A verdict had been found for the plaintiff, the judge before whom the cause was tried having left it to the jury to consider, whether the risk was increased by sending the parcel by the stage coach instead of the mail, and if they were of that opinion, to find a verdict accordingly. A rule nisi having been obtained for a new trial, on the ground that the carrier was protected by the terms of his notice, the parcel not having been insured, the Court discharged it, and said—the question is, whether the carrier is protected from the loss in question by the terms of his notice. We think, that in cases of misfeasance, a carrier is not thereby exempted from loss. This is clearly a case of misfeasance. It is not mere neglect in the course of performing the contract, but an absolute refusal by the defendant to execute the engagement entered into by him; for here he contracted to send by one conveyance, the proprietors of which would be responsible in case of loss, and he sends by another, owned by different proprietors. This, therefore, is not a mere breach in the mode of performance, but is a direct contradiction of his contract, and therefore a direct misfeasance. Besides, in this case, the jury having expressly found; that by the substituted mode of conveyance the property was exposed to greater risk than it would have been, had it been sent by the mode elected by the plaintiff, the rule must be discharged. See 4 B. & A. 21; 5 East. 507; Garnett v. Willan, abridged, p. 110.

6. *GARNETT V. WILLAN*. M. T. 1821. K. B. 5 B. & A. 53.

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And in such a case it would have made no difference, had one of these carriers been a proprietor of the substituted vehicle.

The plaintiff, resident at Worcester, having written to their correspondent at London to send them a quantity of goods by the return of mail, a parcel containing them was accordingly delivered at the coach office whence the Worcester mail coach proceeded, and booked "as for the Worcester mail coach to Worcester," of which the defendants were the proprietors. The parcel was accordingly put into that coach, and entered in the usual way-bill as a parcel to be carried from London to Worcester, and actually carried from the inn whence the coach started to an inn in Oxford-street, at which the defendants had no office or servant, but where passengers and parcels were booked for their coach. At this place the parcel was taken out of the mail coach, and there left to be forwarded on the following day by another Worcester coach, in which one of the defendants had no interest, and from which the parcel was lost, but by what means did not appear. The defendants had given a general notice, which was known to the plaintiffs, not to be liable for the loss or damage of goods of the value of those in question, without an additional premium beyond the common carriage price; which was not paid. Under these circumstances the defendants were holden responsible for the loss, on the ground that the delivery and acceptance of the parcel, on the part of the defendants, entitled the plaintiffs; according to their contract, not merely to the care and diligence of one but both of the defendants; and that as they had, by the act of their servant, wrongfully divested themselves of the charge of carrying the parcel to its ultimate place of destination; they were not protected by their notice.

7. *NICHOLSON V. WILLAN*. M. T. 1804. K. B. 5 East. 507; S. C. 2 Smith. Rep. 107

The defendants were the owners of two coaches, a mail and a heavy coach, travelling to the same place, and a parcel was delivered and accepted for the purpose of being sent by the mail; by an entry in the defendant's book it appeared to have been booked for the heavy coach; but no evidence was given that it was put into or carried by either coach, or in what manner the parcel was lost, whether in the warehouse or in the course of its conveyance. The defendants were holden not to be deprived of the benefit of a general notice they had issued restrictive of their common law liability. On the part of the plaintiff it was contended, that the defendants were liable for the value of the parcel, notwithstanding a notice had not been complied with, on the ground that the loss had not been incurred in the course of their employment as carriers, but occasioned by an act of tortious conversion, in direct contravention of the terms on which the goods were delivered to and accepted by them. But it was observed by Lord Ellenborough, C. J., delivering the judgment of the Court, that to found this argument there was no other evidence but the mere fact of booking the goods for a different coach, and a subsequent non-delivery, which could amount to no more than a negligent discharge of duty in their character as carriers, and not to an entire renunciation of that character, and of the duties attached to it, so as to make them guilty of a distinct tortious misfeasance in respect to the goods in question.

8. GARNETT v. WILLAN. M. T. 1821. K. B. 5 B. & A. 63.

Per Best, J. I cannot see, with reference to the question of the responsibility of the carrier, that there is any sound distinction between negligence and misfeasance. I am of opinion, that by the common law a carrier is answerable for the negligence as well as for the misfeasance of his servants.

9. BECK v. EVANS. M. T. 1812. K. B. 16 East. 244; S. C. 3 Campb. 267.

A cask of brandy had been delivered to a carrier to convey from A. to B. During the journey it was frequently observed to leak very much. The waggoner, however, never unpacked it until he had proceeded a considerable way, by which time a great part of the brandy had run out. A notice was relied upon as a defence to this action, no extra charge having been paid for the carriage of such goods. *Per Cur.* I think the carrier does not stipulate for exemption from the consequences of his own misfeasance; and if goods are confided to him, and it is proved that he has misconducted himself in not performing a duty which by his servant he was bound to perform, that is such a misfeasance as, if the goods thereby become damaged, his notice will not protect him from. Now here it appears that the waggoner was informed more than once of the leakage, after which notice it was a duty he owed to his employers to have the leak examined, and stopped, at one of the stages where he halted. That being so, the carrier became clearly liable on this ground.

See Doctor and Student, 278. dial. 2. c. 33; Noy's Maxims, 92.

10. BODDENHAM v. BENNETT. E. T. 1817. Exch. 4 Price. 34.

Per Wood, Baron. Special conditions were introduced for the purpose of protecting carriers from extraordinary events; but they were not meant to exempt them from due and ordinary care. It cannot be supposed that people would entrust their goods to carriers on such terms.

11. BARSON v. DONOVAN. M. T. 1820. K. B. 4 B. & A. 21; N. P. C. 643.

Upon the question of what was to be considered such negligence in a carrier as to deprive him of those privileges he might otherwise have been authorised to avail himself of, coming before the Court, Bayley, J. said—The value is an ingredient to be taken into consideration upon the question of gross negligence; for that is a gross negligence in the case of a parcel of extraordinary value, which, in the case of another parcel, would not be so. The trusting a parcel of 5000*l.* or 10,000*l.*, for a moment, out of the personal care and superintendence of a trustworthy servant, would, if it were stolen during that interval, be gross negligence; but the trusting a parcel of 40*s.* value in the same way, would not. Why? because parcels of great value are a great temptation to thieves to be on the watch for them; parcels of small value are not. In the case of a box, or parcel, known to be of great value, the proprie-

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And as it has been considered that negligence and misfeasance on the part of a carrier have a similar effect;

It has been holden that a public notice can in no case exonerate a carrier from damage arising from gross negligence.

Such notices only guard against extraordinary events;

The question, of what is such negligence, being left to a jury;
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tors may take the extraordinary care in putting it into the personal charge of the coachman or guard, or even of sending a special messenger with it, or going with it themselves; and these are precautions which, in the case of a thing of ordinary value, they would not think of taking.

12. *LOWE v. BOOTH*. E. T. 1824. Ex. 13 Price. 329.

(Whose verdict the Court will in no case disturb, as may be seen, not only from the case of *Lowe v. Booth*, but from the decision of the *Boddenham v. Bennett*, *post*, 114.) but in law of course regulated by the value of the goods committed to the carrier's custody.

Case against a coach proprietor for a box of plate. The plaintiff proved the delivery of the box to the defendant's servant, and the payment of the carriage thereon; also an acknowledgment by the defendant's servant of the receipt of the same, and of its transmission by their coach. On the part of the defendant it was shown, that he had, by agreement with the plaintiff, been accustomed to carry parcels for the latter at a stipulated price per pound, which was less than what was usually charged, he understanding that he would be much employed. It was further shown, that the parcel was put at the back of the coach, in a place without a lock, and where a corn bag also was placed. The jury having found for the defendant, a rule nisi to set aside the verdict was moved for, on the ground, that though the parcel was of value greater than the sum to which the defendant restricted his responsibility, he was nevertheless liable for not having used ordinary care in its preservation.

Per Cur. The defendant has certainly not taken proper care of the plaintiff's property; but we cannot say what is or is not a proper part of a coach for placing parcels, as we might, by so doing, prevent various parts of a coach from being used for the purposes they are now adapted. The question of negligence is the province of a jury to decide, and we cannot interfere with their verdict.—Rule refused

13. *LYON v. MILLS*. T. T. 1804. K. B. 5 East, 428; S. C. 1 Smith. Rep. 478.

If a loss therefore happen from, for instance, the insufficiency of the vehicle the carrier will not be released from his liability.

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It appeared at the trial of this action, which was for damage done to certain of the plaintiff's goods, to wit, 100 bales of yarn; that the goods were delivered on board a lighter, of which the defendant was owner, to be carried from a quay at A. to a sloop lying in the dock. Previous to such delivery, the master of the defendant's lighter, when he was applied to to fetch the yarn, undertook to bring it in the lighter to the sloop; and being asked if the lighter was fit to carry it, said it was very fit and tight, and that he had been down the day before in her to some vessels lying at B. In carrying the yarn in the lighter to the sloop, the lighter leaked, and some of the bales of yarn were thereby wetted and damaged; and on the arrival of the lighter at the sloop, the master of the lighter, on its being mentioned to him that he had got water in his boat, said, there was a bit of a *weep* (a leak) *abast*. Before the second bale of yarn could be hoisted into the sloop, the lighter was going down, and would have sunk to the bottom of the dock with the rest of the bales; but was prevented by getting tackle fixed to her to get her up. The lighter was not tight and sufficient for the carriage of the yarn, but was leaky, and the master of the lighter was guilty of negligence in not stowing the yarn properly. A notice limiting defendant's responsibility was produced; the terms of it is here unnecessary to advert to at length, as the question which was agitated by the Court, for whose opinion the above facts were stated, (a verdict for the plaintiff having been only conditionally indorsed on the *postea*) was, whether the defendant's misfeasance would not have deprived him of the benefit of a notice, even had such general terms as these been inserted, "that he would not be answerable for any other loss or damage," farther than to mention that the notice was merely a safeguard against any loss that might happen from a neglect or breach of performance, in *masters or crews* of vessels belonging to defendant. The Court in giving judgment, after stating that the terms in the notice relating to the conduct of the master or crew, could not apply to this case, which was a breach of performance in the owner of the vessel, observed, that even supposing such general words as above stated, had been used, still defendant would have been responsible; and said—in every contract for the carriage of goods between a person holding himself forth as the owner of a lighter or vessel, ready to carry goods for hire, and the person putting goods on board, or employing his vessel or lighter for that purpose; it is a term of the contract, on

the part of the carrier or lighterman, implied by law, that his vessel is tight and fit for the purpose or employment for which he offers and holds it forth to the public.

¶14. *ELLIS v. TURNER*. E. T. 1800. K. B. 8 T. R. 581.

The owners of vessels on the navigation between A. and C. having given public notice that they would not be answerable for losses in any case, except the loss were occasioned by the want of care in the master, nor even in such case beyond 10l. per cent. unless extra freight were paid; the master of one of the ships took on board the plaintiff's goods to be carried from A. to B. (an intermediate place between A. and C.) and delivered at B.; the vessel passed by B. without delivering the plaintiff's goods there, and sunk before her arrival at C. without any want of care in the master; upon the question, whether the owners of the vessel were responsible to the plaintiff for the whole loss in an action on the contract, the Court said—the vessel went safe as far as B., and there delivered a part of the cargo; but the master of the vessel finding it inconvenient to deliver the rest there, proceeded on the voyage, and the vessel sunk before her arrival at C. The defendants, (the owners) are called upon to make good the loss that happened to the plaintiff's goods; and as the vessel reached in safety, and might have delivered the plaintiff's goods there, we think that this action may be maintained; for though the loss happened in consequence of the misconduct of the defendants' servants, the superiors, (the defendants) are answerable for it in this action.

15. *BODENHAM v. BENNETT*. E. T. 1817. Ex. 4 Price. 31.

In this case a parcel of notes was sent by the defendant's stage coach from H. to B. The plaintiffs were bankers at H. These parcels were always sealed in a particular manner; and the book-keeper knew that they contained notes. The plaintiffs' clerk took a parcel, sealed in the usual manner, to go by the coach to B. on the following morning; he paid for the carriage and booking, but no insurance was demanded or paid. On the following morning the parcel was entered in the way-bill, and put in the back seat of the coach; there were two other parcels also entered in the way-bill. There were no side passengers when the coach left H. When the coach arrived at B. the book-keeper there, who usually unloaded the coach, received the way-bill, and took the other two parcels out of the front seat of the coach, but he did not look for the bank parcel, because the coachman usually carried those kind of parcels in his side-pocket. The coachman on that day was intoxicated, but not so as to be unable to attend to his business. After waiting a quarter of an hour at B. the coach proceeded on to C.; the parcel was lost, but the defendants proved the usual notice, that they would not be liable above 5l. value, unless insured and paid for accordingly. The learned judge stated to the jury the common law liability of carriers, and that they might stipulate to restrain it by notice; that they had given such a notice in this case; and that, therefore, the question was, whether there had been gross negligence in the carrying of this parcel. He then detailed the evidence to the jury, who found for the plaintiffs to the amount of the notes. Upon a motion for a new trial the Court refused the rule; and Mr. Baron Wood said—I see no ground to disturb the verdict. By the common law the carrier was liable from losses arising from accident or robbery; nay, from irresistible force. The case of *Morse v. Slue*. 1 Vent. 190; pressed extremely hard on common carriers; then special conditions were introduced for the purpose of protecting carriers from extraordinary events, but they were not meant to exempt them from due and ordinary care. It cannot be supposed that people would entrust their goods to carriers on such terms. It only means that they will not be answerable for extraordinary events; but we need not, in this case, lay down that rule. Here has been gross negligence, and in all cases of that sort carriers are liable.

16. *SMITH v. HORNE*. H. T. 1818. C. P. 8 Taunt. 144; S. C. 2 Moore. 10; S. C. 1 Holt. N. P. C. 643.

A parcel was in this case lost by defendant, a common carrier, in the course

So where he might have absolved himself from any liability, but refrained from doing so, after which the goods were lost.

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So where a parcel was lost and it was proved that on the arrival of the coach conveying it, the driver was in liquor, and that the driver who saw the entry of it in the way-bill, thinking the coachman (as customary) had the parcel about his person, did not ask him about it, or look into the coach for it.

during delivery. It appeared that the usual notice had been stuck up in defendant's office, of which the plaintiff had been apprized; that it was the custom of the trade to send two persons with the delivery cart; that the defendant had not in other instances deviated from the general practice; but that in the case before the court, he had only sent one, who, while delivering some of the parcels, left the contents of the cart exposed to plunder. The judge at the trial, told the jury to find for the plaintiff, if they considered that the defendant, by sending the cart attended by one man only, had been guilty of gross negligence. Verdict for plaintiff. On motion for a new trial, the Court said—a case of grosser negligence than this we think we have hardly ever known. The doctrine of carriers exempting themselves from liability by notice has been carried much too far. We see nothing in the objections which have been urged to induce us to think that the verdict is not perfectly right.—Rule refused.

(c 5) *By notice of value.*

1. BECK v. EVANS. M. T. 1812. K. B. 16 East. 244; S. C. 3 Campb. 267.

A notice by a carrier "that he would not be answerable for any goods above the value of 5*l.* unless, &c." has been held on not to apply to goods which do not fall within any of the specified articles, but which from their bulk and appearance must be known to exceed the stipulated value.

Action against defendant as a common carrier, for negligently carrying a cask of brandy, the contents of which it appeared had been notified by defendant when delivered. Defendant relied on a notice "that he would not be liable for cases, bank notes, writings, jewels, plate, watches, lace, silk hose, wool, muslins, china glass, paintings, or any other goods of what nature or kind ever, above the value of 5*l.* if lost, stolen, or damaged, unless, &c." It was contended, that as this notice was expressly extended to any goods of *what nature or kind soever*, it must necessarily apply to a cask of brandy. Plaintiff, however, had a verdict; and on motion for a rule to enter a nonsuit, the Court held that the notice must be confined to things of the same description, as cash bank notes, jewels, and watches, the value of which could not well be discovered, unless declared by the owner; but that where there were casks, the contents of which were known, so that they must evidently be above the value of 5*l.* the notice did not apply.

2. DOWN v. FROMONT. T. T. 1814. Westminster Sittings. K. B. 4 Camp. N. P. C. 40.

A notice in nearly similar terms to what is contained in the foregoing case, was contended by the defendant to be a sufficient answer to an action commenced against him for the loss of a package, consisting of a hamper basket (about 12 by 18 inches) containing raw materials for the making of 36 beaver hats, value 22*l.* The contents were not specified when delivered, but the case of Beck v. Evans was relied upon. But Lord Ellenborough said—I do not think the case cited governs the present. There, the carrier knowing that the article entrusted to him was a cask of brandy, necessarily knew that it was above the value of 5*l.* But here what was there to indicate to the defendant the contents or value of this package?

Unless the indications of their value be not clear and manifest.

[116] But it has been since considered, that a notice by a carrier "that he will not be responsible for goods sent to be conveyed, unless, &c." is not de-

3. LEVY v. WATERHOUSE. H. T. 1815. Ex. Ch. 1 Price. 280; S. C. 1 Selw. N. P. 414. 6th edit. S. P. MARSH v. HORNE. H. T. 1826. K. B. 1826. MSS.

When this action which was against a carrier for the loss of a parcel entrusted to his care, the contents of which (200*l.*) were known to the book-keeper, who, for greater security, deposited it in the banker's bag, was tried at Nisi Prius, where the defendant gave in evidence a notice, "limiting his responsibility to 5*l.*, unless, &c.," Gibbs, C. J. ruled, that where a party does not enter and pay for his goods as of greater value than 5*l.*, although the carrier may infer from other circumstances, that they are of greater value than 5*l.* still he may take the benefit of the notice; and that mere knowledge that the goods are of greater value than 5*l.* is not sufficient to deprive the carrier of that benefit. A rule nisi had been since obtained to set aside a verdict which had been given for the defendant, and grant a new trial. On its now coming before the Court, the plaintiff's counsel cited the above case of Beck v. Evans. But the Court said—it seems to us that the Chief Justice's direction was right, and such a one as ought to have been given under the circumstances proved. Here there was

a special notice given by the defendant that he would not be answerable but on certain terms, and there is nothing proved to have been done on his part which amounts to a dispensation with that notice. It appears that the book-keeper might have inferred that this parcel was one of value; but nothing was distinctly said about the actual value, nor did he undertake that the notice should be dispensed with. He did not, therefore, warrant its safe conveyance; and on that ground we think the direction correct. In *Beck v. Evans*, the Court decided against the carrier, on the ground of gross negligence and nonfeasance; and I apprehend the question there would have been materially varied, if the cash had been merely missing.

4. *THORGOOD V. MARSH*. H. T. 1819. C. P. 1 Gow. N. P. C. 105. S. P.

ALFRED V. HORNE. E. T. 1822. K. B. 3 Stark. N. P. C. 136.

In this case a package consisting of stationary, of the weight of 480lb., had been entrusted to a carrier to be carried to a certain place, and had been destroyed by fire. It appeared, that the property was left at an inn for the defendant, and it was safely and properly left there. The defendant, however, produced a notice as follows—"that he would not be answerable for any plate, &c. or any article of more than 5l. value, unless entered as such and paid for accordingly." The evidence satisfactorily brought home to the plaintiff a knowledge of the notice, since copies of it had been traced into his hand, for several years past. An objection, was, however, urged against the efficacy of the notice, viz. that although there was nothing on the outside which indicated the value or quality of the contents of the parcel, yet that its magnitude was a sufficient warning to the defendant to enable him to protect himself against any particular hazard. But *Dallas, C. J.* said, where a carrier gives notice that he will not be liable beyond a stated sum in the event of his own terms not being complied with, if the party sending goods by that carrier have notice of the qualified restriction which he imposes on his own liability, and do not comply with the terms prescribed, the carrier, in case of a loss happening, is not liable.

5. *WILSON V. FREEMAN*. H. T. 1814. Guildhall Sittings. K. B. 2 Campb. N. P. C. 527.

A notice was published by defendant, who was a common carrier of goods from A. to B., "that he would not be accountable for any china, glass, &c. nor for any other article of more than 5l. value if lost or damaged, unless specified and paid for as such when delivered." In this case plaintiff brought an action for the negligent carriage of a looking-glass, which had been delivered, but not paid for according to this notice, although much above the value of 5l. and contended he was entitled to recover, as when the package was taken to defendant's office, the book-keeper was told what it contained, and said, he should charge four cwt. for it, although, in fact, it weighed but three; when the person who took it desired him to charge for it what he pleased; saying, "you shall be paid, provided you take care of it." Lord Ellenborough, however, held, that as the book-keeper knew what the article was, and was told its value, and was desired to charge what he pleased, the payment of the money was dispensed with, and the notice was unavailing.—Verdict for the plaintiff.

(d 2) *How nullified.* (a 3 *By party's own acts.* (a 4) *By fraud or concealment on part of Bailor.*

1. *TYLV V. MORRICE*. E. T. 1698 K. B. Carth. 485.

The defendant was a common carrier from London to Exeter, and the plaintiff, by his servant, delivered to his (the defendant's) book-keeper, 2 bags of money sealed up, and told him that it was 200l., and desired a receipt for the

* In fact, it may be stated as a general rule, that where a notice requiring an additional premium, according to the value of the article, is not complied with, that the owner, by declining to pay the enhanced price, takes upon himself the risk against which that payment would secure him, and cannot look to the carrier to sustain it; and that the only effect of knowledge in such case, would be to render the carrier responsible for a degree of care proportionate to the nature and value of the article.

carrier can money; thereupon the book-keeper gave a receipt for his master to this effect: not be sued "Received of, &c. two bags of money sealed up, said to contain 200*l.* which I promise to deliver at such a day Exeter unto T. Davis, he to pay 10*s.* per cent. for carriage and risk." The carrier was robbed of this and other money on Hounslow Heath in the night-time; but he paid 200*l.* to Davis at Exeter. And now an action was brought against him in common form, upon the custom of England, wherein the plaintiff declared, that on such a day and place, he had delivered unto the defendant 450*l.* to be carried from London to Exeter, &c. &c. At the trial, it was proved that there was full 450*l.* in gold and silver contained in those two bags at the time they were delivered to the carrier for 200*l.* And the question was, whether the carrier should answer for the whole money. It was the opinion of the Chief Justice, that he should answer for no more than 200*l.* (which was acknowledged he had paid to Davis,) because there was a particular undertaking by the carrier for the carriage of 200*l.* only, and his reward was not to extend any further than that sum; that it was the reward which made the carrier answerable; and that since the plaintiff had taken this course to defraud the carrier of his reward, he had thereby barred himself of that remedy which was founded only on the reward. The jury were directed to find for the defendant.

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2. MORSE V. SLEW. 1 Ventr. 190. 238; S. C. 3 Keb. 72. 112. S. C. 2 Lev. 69; S. C. Raym. 220.

But the propriety of this rule seems to have been at times overlooked.*

In this case, the defendant in his capacity of a common carrier had been entrusted with the charge of a box in which there was a large sum of money, of which he had been robbed; and, although it appeared that when the box had been delivered to defendant, he had made inquiries as to its contents; and that he had received the following answer, viz. "that it was filled with silks and such like of goods real value," upon which he had undertaken to take care of it; yet the Court considered the action maintainable.

3. GIBSON V. PAYNTOY. M. T. 1769. K. B. 4 Burr. 2299.

As may be seen from the observations of subsequent judges in commenting upon the absurdity of such a doctrine being given effect to.

This was an action against the Birmingham stage-coachman, for 100*l.* in money, sent from Birmingham to London by his coach, and lost. It was hid in hay in a nail bag; the bag and the hay arrived safe, but the money was gone. The coachman had inserted an advertisement in a Birmingham newspaper, with a nota bene, "that the coachman would not be answerable for any money or jewels, or valuable goods, unless he had notice that it was money or jewels, or valuable goods, that was delivered to him to be carried." He had also distributed handbills of the same import. It was notorious in that country, that the price for carrying money from Birmingham to London was threepence in the pound. The plaintiff was a dealer at Birmingham, and had frequently sent goods from thence. It was proved that he had been used for a year and a half to read the newspaper in which this advertisement was published, though it could not be proved that he had ever actually read, or seen, the individual paper, wherein it was inserted. A letter of the plaintiff's was also produced, from whence it manifestly appeared that he knew the course of this trade, and that money was not carried from that place to London at the common and ordinary price of the carriage of other goods; and it likewise appeared from this letter, that he was conscious that he could not recover by reason of his concealment. The jury found a verdict for the defendant. But the plaintiff afterwards moved for a new trial. The court, however, were clearly of opinion that the verdict was right, and therefore refused

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* For where the plaintiff delivered to the defendant, a carrier, a box, telling him only "that there was a book and tobacco in the box;" whereas, in fact, it contained 100*l.*, Roll, C. J. was of opinion, that as the carrier had not made a special acceptance, he was answerable; but with respect to the intended cheat upon the carrier, he told the jury they might consider him in damages, but they notwithstanding gave a verdict for 97*l.* against the carrier. "*Quod*" observes the reporter, "*durum videbatur circumstantibus*," Kenrigg v. Eggleston, Aleyn. 98. In the case of Drinkwater v. Tannell, Bell. N. P. 706; and 7 Mod. 248; it was holden, that if a carrier asks what is in the box and is told there is silk, and there is in truth money, he should answer for it if lost, unless he made special acceptance, and that the intended cheat would accordingly go in mitigation of damages.

the rule. Lord Mansfield, C. J., after commenting on the case of *Kenrigg v. Eggleston* (ante, p. 118,) and the case of *Morse v. Slew* (ante, p. 118,) observing, that in the first case he should have agreed in opinion, *cum circumstantibus*; and that in the second, he should have thought the carrier excused, although he had not expressly proposed a caution against being answerable for money, for it was artfully concealed from him that there was money in the box; distinguished between the case of a common carrier, and that of a bailee, and said—the latter is only obliged to keep the goods with as much diligence and caution as he would keep his own; but a common carrier, in respect of the premium he is to receive, runs the risk of them, and must make good the loss, though it happen without any fault in him, the reward making him answerable for their safe delivery. This action is brought against the defendant, upon the foot of being a common carrier. His warranty and insurance is in respect of the reward he is to receive, and the reward ought to be proportionable to the risk; if he makes a greater warranty and insurance, he will take greater care, use more caution, and be at the expence of more guards, or other methods of security; and therefore, he ought in reason and justice, to have a greater reward. Consequently, if the owners of the goods have been guilty of fraud upon the carrier, such fraud ought to excuse the carrier; and here the owner was guilty of fraud upon him, the proof of it is over-abundant. The plaintiff is a dealer at Birmingham; the price of the carriage of money from thence is notorious in that place; it is the rule of every carrier there; it is fairly presumed, that a man conversant in a trade, knows the terms of it; therefore the jury were in the right in presuming that this man knew it. The advertisement and handbills were circumstances proper to be left to the jury; the plaintiff's having been used for a year and a half to read this newspaper is a strong circumstance for a jury to ground a presumption that he knew of the advertisement; then his own letter strongly infers his consciousness of his own fraud, and that he meant to cheat the carrier of his hire; therefore, I entirely agree with the jury in their verdict.

4 *BATSON v. DONOVAN*. M. T. 1820. K. B. 4 B. and A. 21.

This action was brought against the defendants as common carriers, to recover a compensation for the loss of a box, containing bills and bank notes to the amount of 4072l., which had been lost out of a stage-coach, of which they were the proprietors. The defendants had given notice that they would not be answerable for parcels of value, unless entered and paid for as such. The plaintiffs knew of this notice. The box was left with one of the defendants at B., and booked. Nothing was said at the time of the booking, but that it was the box for N. The box was addressed to W. B. and Co. N., and had on it a brass plate, with the words "B. and Co." W. B. and Co. were bankers, both at B and N. The coach arrived at B. at twelve at night, and remained half an hour in the middle of the street, which is the width of 80 yards. About a quarter after twelve, the box was put into the boot of the coach. A porter was ordered to watch the coach, but this person was at a considerable distance from it, and was so inattentive to his duty that the box was stolen from the coach while it was so left in the street, and so watched by the porter. Bayley, J. before whom this cause was tried, when a verdict had been found for defendant, said—I left, I believe, these two questions to the jury; first, whether the plaintiffs dealt fairly with the defendants in not apprising them that the box contained articles of value; and secondly, whether in the case of a parcel of such value as the defendants might fairly expect this to be, there was gross negligence in the defendants; and I rather think I left those questions in such a way, that unless the jury were with the defendants on both, they should find for the plaintiffs; but I am not confident upon that point.

Best, Justice, previous to the rest of the court delivering judgment, begged leave to observe, that consistently with his duty as a judge, he could not assent to the view that had been taken of the case before them; and said, That on the one hand he knew of no case where a jury had been told to consider whether the owner of a parcel made a proper disclosure of the nature of its

contents to the carrier, or any party placed in a similar situation; that on the other, it was going much farther than a carrier's liability under the law would warrant to direct a jury to find him guilty of gross negligence, without any explanation of what was meant by those terms, before they fix him with the loss of a parcel; that the novelty of such a direction was of itself sufficient to make him pause; that as to the first part of the learned judge's direction, it had been long settled that it was the carrier's duty to make the inquiry; that he might then, if he thought proper, make a special acceptance of the goods; and in that case, if any fraud had been practised on him; if any artifice to give the box, containing the parcel, a mean appearance, and thereby to induce the carrier to think it of no value, and so to prevent him from making strict inquiries, had been proved, the case would have been different; that if a contrary rule were established than what had hitherto been acted upon, this difficulty would arise; what is to be considered a parcel of such value as to render it necessary to caution the carrier? must it be of the value of 1000*l.* or 100*l.* or 10*l.*? must it contain jewels or gold? that supposing no notice had been given, the plaintiff, unasked by the defendant, need not have said a single syllable as to the value of the box; that the only object of the notice was to prevent the necessity of a particular inquiry in each case, that these notices did not affect the responsibility of carriers in cases of negligence or misfeasance, that the assertion at the bar, that if the carrier had been informed that it was a parcel of great value, he would have been more careful, was; therefore completely answered; that the notice only absolved the carrier from his liability as an insurer of goods above a certain amount; that, nevertheless, if that attention which the carrier would have paid to the safety of a coach laden with packages, each under 5*l.* value, was wanting, for that negligence the carrier was responsible, whatever might be the amount of the loss incurred by any particular individual; that with deference, he therefore submitted the jury should have been asked, whether they thought the defendant had sufficiently guarded a coach, containing many parcels, each of small value; and that as to the second part of the learned judge's address, he was equally clear that there should have been some explanation of what was meant by gross negligence, as the general meaning attached to it would be, conduct highly blameable, whereas something much short of that sort of conduct would be sufficient to render a carrier liable, he being bound to take the same care of property bailed to him, as a prudent man would take of his own, although he must confess he was at a loss to see how negligence could not but be imputed to the defendants, when it was shown that the coach was left in such a situation in the street, that the owners thought it right to place some one to watch it, and that person was either at a great distance from the coach, or so inattentive to his duty, as to suffer persons to go to the coach, and steal the box.

But Abbott, C. J., and Bayley and Holroyd, Js., said—in cases where the carrier has not given notice, or where the notice does not come to the knowledge of the party, he holds himself out as a common carrier to take goods in general, and he would then be bound to inquire the value either if he expected an additional reward, or had any objection to carry any particular article. But that reason does not apply to a case such as the present, where the owners of the goods had notice that the carriers would not be responsible for goods of a particular description. The reason for the carrier's giving such notice is on account of the risk he runs in the carriage, that he may claim an adequate reward for it, and also that he may use due care, and be provided with sufficient means to guard against any loss. It was the duty of the plaintiffs, knowing such fact, therefore, in bringing such articles to the carriers, not to deliver them as ordinary goods, but to inform them of their nature and value. By acting as they did, they held out to the carriers, as plainly as if they had told them so, that these were goods which the carriers would not object to take on the ordinary terms, and that they were to consider them as such. Had the defendants been apprized that the box contained the value it did, that so very large an inducement was held out to thieves, and that the loss of it would make

them answerable to that extent, can any one believe that they would not have taken more care of it than they did. Thus the plaintiffs, who by omitting, what they ought to do, prevented the defendants from taking that extraordinary care which, but for that omission, they probably would have done, ought to bear the loss; and that seems to us a sufficient answer to the main objection to the learned judge's direction, viz. that he desired the jury to consider whether there had been any thing like unfair dealing, or want of proper caution on the part of the plaintiffs. Upon the ground, therefore, that the defendants ought to have been apprized of the value of this box, and were not; that the plaintiffs were guilty of misconduct in this respect; that the plaintiffs' neglect deprived the defendants of the compensation they ought to have received, and prevented the defendants from taking the care, which they otherwise would have done; and that the value of the parcel increased the probability of loss; we are, of opinion, seeing that there is no misfeasance on the part of the defendants, that the plaintiffs' neglect is, under the circumstances of this case, a bar to the action, and that the direction of the judge, before whom the cause was tried cannot be impugned.

5. *BIGNOLD V. WATERHOUSE*. E. T. 1813. K. B. 1 M. & S. 255.

It was agreed between the plaintiff and one of the defendants, proprietors of a stage coach, to carry certain parcels for the plaintiff, free of expense, which were accordingly carried for two years; but there was no evidence of any knowledge of this agreement by the other defendants; and the defendants had given notice that they would not be accountable for parcels above the value of 5*l.*, unless entered and paid for, &c. The Court held that the defendants were not liable for the loss of a parcel above the value of 5*l.*, sent by the plaintiff under this agreement, of which no notice of its value had been given to the defendants; observing, The object of requiring notice in these cases is twofold; first, to obtain a larger premium for the conveyance of valuable parcels; and secondly, to put the proprietors on their guard; and therefore we think, that where such notice as the present is required to be given, even in a case where a carrier undertakes to convey goods without reward, if the goods exceed the value limited, notice ought to be given, in order to direct his attention to the particular goods; for he does not dispense with notice *in toto*, but only with payment. Here there was no evidence that any notice had been given as to this being a parcel of value. If any of us had been desired to leave it to the jury, whether the defendants knew this to be of value, we should certainly have left that question to them.

6. *HARRIS V. PACKWOOD*. M. T. 1810. C. P. 3 Taunt. 264.

The defendant, a carrier, gave notice that he would not be answerable for goods above the value of 20*l.*, unless entered and insurance paid, over and above the price charged for carriage, according to their value. A person who entered silk, exceeding the value of 20*l.*, and who was aware of the notice, did not pay the insurance. The silk was lost; and upon the question of, whether the defendant was liable, now coming before the Court, the judge before whom the cause was tried, having said, that as it did not appear that the parcel was not lost through mere negligence, the defendant was responsible; and that at all events that it lay on the defendant to show that he took reasonable care of the property; upon which the jury had found a verdict for the plaintiffs; they held that the *onus probandi* lay on the plaintiff to establish there was negligence; and Lawrence, J. said—there was nothing unreasonable in a carrier requiring a greater sum where he carried goods of a greater value, for he is to be paid not only for his labour in carrying, but for the risk he runs, which is greater in proportion to the value; and the defendant having given a notice which the plaintiff knew, the latter must be nonsuited.

7. *SLEATT V. FAGO*. H. T. 1822. K. B. 5 B. & A. 342. *S. P. BATSON V. DONOVAN*. M. T. 1820. K. B. 4 B. & A. 37.

In this case, defendant, a common carrier of goods, endeavored to release himself from any liability attaching to him in that capacity, in respect to a parcel which had been entrusted to his care by the plaintiff, on the ground that the

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That both the Court of King's Bench;

And Common Pleas, have considered it an unfair dealing on the part of the plaintiff, to refrain from disclosing the value of a parcel of the risk of conveying which, the carrier has taken the precaution to guard himself against, by a public notice of which the plaintiff was cognizant;

In cases where there has been no misfeasance on the part of the carrier.

[123] contents of it were 1300*l.* country bank notes; that the parcel had been directed to a clerk, in order to conceal its contents; and that no communication had been made of its value, although a notice restrictive of his responsibility had been issued with plaintiff's knowledge. But it being proved that the parcel had been sent by a different coach from that elected by the plaintiff, the plaintiff had a verdict. On a rule nisi for a new trial, and the citation of the case of *Batson v. Donovan* (*ante.* p. 119.) the Court said—in *Batson v. Donovan*, the very ground of action against the carrier was a negligent performance of his duty; and it was held, that the plaintiff in that case could not make that negligence a ground of action, because he had superinduced it by his own neglect, in not communicating the value of the parcel to the defendants. Here however, the defendant would have sent the parcel by the same coach, even if the plaintiffs had described it as a parcel of value, inasmuch as all parcels sent to the office, before a certain hour, were forwarded by that coach; and, therefore, the concealment of the value was not the cause of the non-performance of the contract, in which respect this case is distinguishable from *Batson v. Donovan*.

8. *EDWARDS v. SHERRATT.* T. T. 1801. K. B. 1 East. 604.

So where the contract is made under such circumstances and at such a time, as which the defendant not returning any answer, and plaintiff fearing to wait till the day the defendant's boat would, in the usual course of employment, go from W. to B., stopped the boat passing by from R. to B., and without disclosing the circumstances to the boatman, prevailed on him to take the corn on board, and then dispatched him forward in the night, having privately sent orders to open the lock at any time when he should pass. After a verdict for the defendant, negativing that the corn was delivered in the usual course of dealing as a common carrier, the Court held that the verdict might be sustained either on the general ground of fraud in the plaintiff, or on the circumstances of the case, furnishing altogether evidence of a tacit stipulation on the part of the defendant, to do the best he could, but not to be answerable, as a common carrier, for the violence of the mob; or because it did not appear that the boatman, whose ordinary employment was between R. and B., had authority from the defendant to accept the goods at W. for B., much less to accept them in that manner.

A carrier is discharged by neglect on the part of the bail or, as if he omit to obtain permission for goods to be landed;

(b 4) *By neglect of Bailor.*

1. *WHALLEY v. WRAY.* M. T. 1799. C. P. 3 Esp. 74.

[124] *Assumpsit* against a lighterman for damage done to rice by not being duly landed; but it appearing that previous to its being landed it was necessary to obtain a permission from the Custom House; held, that as the obtaining such permit was no part of the lighterman's duty, but rather of the plaintiff's Custom House agent; the plaintiff could not rely on the general liability of the defendant, without proving that it was his duty to have done that from the neglect of which the loss had arisen.

2. *STUART v. CRAWLEY.* H. T. 1818. K. B. 2 Stark. 323.

A greyhound was delivered to defendant, a common carrier, who gave a receipt for it. The greyhound being afterwards lost, and this action instituted to recover damages in consequence of such loss, defendant set up as a defence, that the dog was not properly secured when delivered to him; and it was urged, that the case was similar to that of a delivery of goods imperfectly packed, and where the loss arises from want of care on the part of the owners. But Lord Ellenborough drew this distinction—That in the latter instance the defect was not visible; whereas, in the former, the carrier had the means of seeing that the dog was insufficiently secured. A verdict was accordingly found for the plaintiff.

(b 3) *By act of God.*

1. *AMIES v. STEVENS*. M. T. 1718. K. B. 1 Lev. 128. *S. P. HYDE v. THE TRENT NAVIGATION COMPANY*. M. T. 1793. K. B. 5 T. R. 389. *LYON v. MELLIS*. T. T. 1804. K. B. 5 East. 428. *DALE v. HALL*. M. T. 1750. K. B. 1 Wils. 281; *Jones*. 104.

So if any damage or loss arise from the act of God;

The plaintiff put goods on board the hoy of the defendant, who was a common carrier; and, coming through a bridge, by a sudden gust of wind, the hoy sunk, and the goods were spoiled. Pratt, C. J. held the defendant not answerable, the damage having been occasioned by the act of God, for though the defendant ought not to have ventured to shoot the bridge if the general bent of the weather had been tempestuous, yet this, being only a sudden gust of wind, had entirely varied the case.

2. *FORWARD v. PITTARD*. M. T. 1785. K. B. 1 T. R. 33.

Or in other

Per Cur. It is laid down, that a carrier is liable for every accident, except by the act of God or the king's enemies. Now, what is the act of God? I consider it to mean something in opposition to the act of man; for every thing is the act of God that happens by his permission; every thing by his knowledge. But to prevent litigation and collusion, the law presumes against the carrier, unless he shows it was done by the king's enemies, or by such act as could not happen by the intervention of man; as storms, lightning and tempests. [125]

3. *SMITH v. SHEPHERD*. Lent Assizes for Yorkshire. 1795. Abbott on Shipping, 232.

But the act of the Almighty

This was an action brought against the defendant, as master of a vessel navigating the river Ouse and Humber, from Selby to Hull, by the plaintiff whose goods had been wet and spoiled. At the trial it appeared in evidence, that at the entrance of the harbour at Hull there was a bank on which vessels used to lie in safety, but of which a part had been swept away by a great flood some time before the misfortune in question, so that it had become perfectly steep instead of shelving towards the river; that a few days after this flood a vessel sunk by getting on this bank, and her mast, which was carried away, was suffered to float in the river, tied to some part of the vessel; and that defendant, upon sailing into the harbour, struck against the mast, which not giving way, forced the defendant's vessel towards the bank, where she struck, and would have remained safe had the bank been in its former situation; but on the tide ebbing, her stern sank into the water, and the goods were spoiled, upon which the defendant tendered evidence to show that there had been no actual negligence. Mr. Justice Heath, before whom the cause was tried, rejected the evidence; and he further ruled, that the act of God, which could excuse the defendant, must be immediate, but that this was too remote; and directed the jury to find their verdict for the plaintiff; and they accordingly did so. The case was afterwards submitted to the opinion of the Court of King's Bench, who approved of the direction given by the learned judge at the trial, and the plaintiff succeeded in the cause.*

must be immediate, and not remote, to enable the carrier to excuse himself from incurring his general responsibility.

(c 3) *By act of the king's enemies.*

1. *PROPRIETORS OF THE TRENT NAVIGATION v. WARD*. E. T. 1785. K. B. 3 Esp. 131. *S. P. Jones*. 104.

So if the action arise from any act of the king's enemies.

Per Cur. The general rule is, that a carrier is answerable for all losses, except for those occasioned by the act of God or the king's enemies.

2. As the exception of foreign enemies in a carrier's contract is derived from the principle, that in that particular case the carrier can have no remedy by action against the hundred, it includes, under that term, only those foreign enemies of the king which are such by open declaration of war, and not such domestic enemies as are considered so by reason of any temporary insurrection or riot; in which cases, as the county or hundred are responsible for not preserving the peace, the carrier might recover under the statutes against them, for losses occasioned thereby; see *Jeremy's Law of Carriers*, 57.

Under which term are included only foreign enemies.

* There does not appear to have existed in this case any bill of lading, or other instrument of contract, and the question therefore depended upon general principles; and not upon the using of any particular words or exception.

[126] 3. AMIES V. STEVENS. M. T. 1718. K. B. 1 Str. 129. FORWARD V. PILLARD. M. T. 1785. K. B. 1 T. R. 27. WHALLEY V. WRAY. M. T. 1799. C. P. 3 Esp. 76; 2 Bulstr. 280.

Unless, in deed, the carrier act with so little precaution as to bring upon himself the effect of such act.

From this case, as it has been already abridged (*vide ante*, p. 124,) it will be observed, that however the circumstance of the carrier's losing the property committed to his custody from inevitable accident may excuse him, yet that where he might, if he had acted more prudently, have avoided the accident, a verdict would be given against him.

3d. After the termination of their journey.

(a 1) Of their obligation to deliver. (a 2) In general.

Where it is the general course of the carrier's trade to deliver goods, we have before seen he will be bound to do so, unless from peculiar circumstances such obligation be nullified.

But in the absence of any such usage, it has not been judicially determined, that by the common law such obligation exists, although to form an opinion from the dicta

[127] which have fallen from judges, not only of the King's Bench,

But of the Common Pleas.

1. A carrier, as it has been already stated (*ante*, p. 89.) is bound to deliver goods if it be the general course of his trade; for by the receipt of them he will be understood to have contracted for their conveyance on the same terms, and in the same manner in which he usually transacts his business with respect to other persons; such usage of trade, or any other particular custom, being always considered binding, provided they are mutually known; unless from other circumstances it appears, that at the time the defendant undertook the charge of the goods, he could not have been supposed to have considered the duty to deliver part of his general liability.

2. HYDE V. THE TRENT AND MERSEY NAVIGATION COMPANY. M. T. 1793. K. B. 5 T. R. 396.

In this case the general question of whether a common carrier is bound to deliver goods, sent by him, at the residence of the individual to whom they were directed, was agitated. Ashhurst, Buller, and Grose, Js. (Lord Kenyon, C. J. diss.) were of opinion, that the carrier was so bound; and Ashhurst, J. observed—the inclination of my opinion on the general question, is, that a carrier is bound to deliver the goods to the person to whom they are directed. A contrary decision would be highly inconvenient, and open a door to fraud; for if the liability of the carrier were to cease when he had brought the goods to any inn where he might choose to put up his coach, and a parcel containing plate or jewels, brought by him, were lost before it was delivered to the owner, the latter would only have a remedy against a common porter. It has been said, however, that it is the practice of many persons to send to the inn for their goods, but that does not prove that the carrier is not bound to deliver them if they do not send. If the owner choose to send for his goods, that merely discharges the carrier from his liability in that case; it only dispenses with the general obligation thrown by the law upon the carrier; but it does not apply to other cases where that obligation is not dispensed with. But on this question I do not mean to give any decided opinion.

3. DUFF V. BUDD. H. T. 1822. C. P. 3 B. & B. 177; S. C. 6 Moore. 469.

The judge before whom this cause was tried; the facts of which have been already abridged, *ante*, p. 107. from which it will be seen that a parcel had been delivered to defendant, as a common carrier, directed to "A. B., High-street, Oxford," for whom defendant had often carried parcels, but who, in this case, had told defendant, upon being asked, that the parcel was not for him; and from which, it will be observed, that the parcel had been delivered to a wrong person, representing himself as Mr. Parker, but whose residence was unknown to defendant, said—It was the duty of the defendant, as a carrier, on the arrival of the parcel at Oxford, to have taken care that it was duly delivered as directed; as it was proved at the trial that the course of delivery invariably adopted by the defendant was to deliver parcels at the respective houses to which they were directed; and he left it to the jury to say whether the defendant had been guilty of gross negligence, observing, that if this was not negligence, there must be an end of carrying for hire; for who would be safe if a carrier was to deliver to a person, whose residence was unknown to him, a parcel directed to a known place of residence; upon which the jury found for the plaintiff; and from the general observations of the Court, when the case was brought before them, on motion for a new trial, they seemed inclined to favour the general proposition, that a carrier was, in all cases bound

to deliver goods when he was aware of their place of ultimate destination; and Burroughs, J. said—Carriers are constantly endeavoring to narrow their responsibility, and to escape out of their duties; and I am not singular in thinking that their endeavours ought not to be favoured.

4. *BODENHAM v. BENNETT*. E. T. 1817. Ex. 4 Price. 31.

Per Wood, Baron. The carrier does not merely engage safely to carry and convey; he also engages safely to deliver.

5. *BIRKETT v. WILLAN*. H. T. 1819. K. B. 2 B. & A. 356.

Abbott, C. J. at the trial of this cause, said—If a parcel is directed to a person generally, in such a place as Exeter, without specifying the place of abode, the carrier would not be bound to carry that parcel to any place; but he would fully discharge his duty by delivering it, at his office, to any person coming from the party to whom it was so directed, or whom he might reasonably suppose to come from that person.

6. *GARNETT v. WILLAN*. M. T. 1821. K. B. 5 B. & A. 58.

In this case, Bailey, J. in commenting upon the decision of *Birkett v. Willan*, 2 B. & A. 356. observed—in that case a parcel of indigo was sent by a carrier, directed to a person at Exeter, and it was delivered by the book-keeper at the coach-office to a person who applied for it, but who had no right to receive it. In that case there was a wrongful delivery by the act of the servant. The Lord Chief Justice, at the trial, was of opinion that the carrier was protected by the terms of his notice; but the Court, upon a motion for a new trial, were of opinion, that that being a case of gross negligence, was a loss not protected by the terms "lost or damaged," in such a notice. Now, in that case, the carrier, by a wrongful act of his servant, had divested himself of the charge of carrying the parcel to its ultimate place of destination, for it was his duty to carry it to the house of the person for whom it was intended at Exeter, if he found the person to whom it was directed, or to keep it, in order to make due enquiry to find him out.

7. *STORR v. CROWLEY*. H. T. 1825. Ex. 1 M'Clelland & Younge. 129.

The defendants received goods of S., at L., on an undertaking to carry them to W., and deliver them to S. for his use, on payment of the bill. The goods were carried to W., and sent from the warehouse nearly half a mile to the house of S.; but the bill not being ready to be paid, were taken back to the warehouse. Applications to send the goods again to the house were refused, not on the ground that the contract had been performed by the carrier, but until satisfaction of a lien set up on one side and resisted on the other and which proved to have been unfounded in fact. Under these circumstances it was urged, on the part of the defendants, when these facts now came before the Court, upon a rule to set aside a nonsuit which had been entered, that as they had tendered a performance of the contract by once taking the goods to the house, the original promise to deliver did not revive; and that it might be even urged, that no action at all could be maintained on the case pending before the Court. The Court said—We do not think that we are called upon to say, whether a carrier is or is not bound to deliver goods at the house of the consignee, though there are high authorities that he is. Neither is it necessary, according to the turn our minds have taken upon this case, to form an opinion on the question, of whether a carrier is bound to bring goods for delivery more than once, although it appears to us to be sufficiently proved from the cases, as a general rule, that a carrier having once tendered a delivery, has discharged himself of his obligation; because, otherwise, when is his liability to cease? To construe his undertaking in any other way would be attended with the greatest inconveniences. But the question is whether, under the circumstances of the particular case, the rule to be applied is not a different one. Now, had the defendants, upon being subsequently applied to, said, "I have offered to deliver the goods at the house once—I am not obliged to do so any more;" there might have been some foundation for us to come to a con-

And Exchequer, the Courts seemed inclined to impose such a duty on common carriers,

And although in a subsequent case it was said, that where a parcel was directed to a person generally, he was not bound to carry that parcel to any place. Yet from the view the Court afterwards took of that observation

And from a still later decision; it would appear to be the carrier's duty to carry the parcel to the house of the consignee, if he was aware of his residence, or to keep it in order to make due enquiry.* At all events, it has been adjudged, that if the carrier tender the goods, not accepted, his obligation is at an end, unless from

* And it has been decided, that the leaving goods at an inn is not a sufficient delivery; *Sel. N. P. tit. Carriers*.

circumstances it is clear he did not suppose his undertaking could be summated. [129]

contrary decision, on the ground that the defendants meant to consider such act as a final performance of their contract as common carriers. But the defendants' act amounts to an express and direct waiver of the advantages which they might have upon the ground of the proffer, and proves that, according to the understanding of the parties (though possibly not according to the general rule of law,) there was a continuing contract to find out the person to whom the goods were consigned, and to deliver them. For these reasons the rule must be made absolute.—Rule absolute.

8. GOLDEN V. MANNING AND PEYTON. T. T. 1773. C. P. 3 Wils. 429; S. C. 2 Bl. 916; S. P. Alleya. 93; Owen. 57.

But whatever doubt may exist in general, it would appear that the carrier would be bound to give notice of the arrival of the goods.

Case against common carriers, for not delivering a box containing silks, which came to their warehouse without any legible direction upon it, and remained there for the space of a year, during which time they became considerably damaged, and for which satisfaction was refused. It was said, that as the defendants hired a porter to carry out parcels at a stated salary by the week, and to receive the portage of such goods, the defendants engaged, and specially undertook (in this particular case,) to deliver the goods by that porter. And, upon the general question, it was said—There can be no doubt but carriers are obliged to send notice to persons to whom goods are directed, of the arrival of those goods, within a reasonable time, and must take care that the goods be delivered to the right person. It was by the negligence of the defendants that the direction of the box was obliterated.—Verdict for the plaintiff.

(b 2) *Within the bills of mortality.*

And it is clear that by the 39 Geo. 3. c. 58. com-

The 9th section of the 39 Geo. 3. c. 58. which was passed to regulate the rates for the carriage of goods, &c. to be taken by common carriers, innkeepers, and other persons within the cities of London and Westminster, the borough of Southwark, and places adjacent, enacts, that upon complaint made of any non-delivery, neglect, misconduct, or misbehaviour in such employment, to any justice of the peace within whose jurisdiction the offence has been committed, or the offender shall be or reside, it shall and may be lawful to and for such justice of the peace to grant a warrant to bring before him the person against whom such complaint shall be made; and upon proof made upon oath (which oath such justice is hereby empowered to administer,) of any such non-delivery, neglect, misconduct, or misbehaviour of such porter, or other person, to impose a fine or penalty upon such porter, or other person, not exceeding the sum of 20s., nor less than 5s.

By the 4th sect. of the preceding act, parcels arriving in town by any conveyance for hire, other than stage waggons, shall be delivered according to the direction thereof, within six hours after the arrival of any such parcels, unless such arrival shall be between the hours of four in the evening and seven in the morning; and in that case every such delivery shall be made within six hours after such hour in the morning, under a penalty not exceeding 20s. nor less than 10s. And by sect. 5. every parcel arriving by any public stage waggon, shall be delivered within 24 hours after such arrival, (except directed to be left till called for,) under a like penalty.

Unless previously called for; [130]

By the 8th sect. of the same act, if a parcel not directed to be left till called for, shall, before the same is sent for delivery from such place, be demanded by any person properly authorised to receive the same, such box, basket, or other article, shall be thereupon delivered to such person so demanding the same; and it shall, in such case be lawful to and for such innkeeper, warehouse-keeper, or other person, to charge and take the sum justly due for the carriage thereof, and also the sum of twopence for the warehouse-room thereof; but if the same be not delivered to such person upon such demand, or any charge other than as aforesaid be made or received in respect thereof, every innkeeper, warehousekeeper, or other person, to whose inn, warehouse, or other place, such box, basket, or other article, shall be brought as aforesaid, shall forfeit and pay for every such offence any sum not exceeding 20s. nor less than 10s.

By the 6th sect. every parcel directed to be left till called for, shall, upon

the demand of the person properly authorised to receive the same, be delivered to such person without any charge or demand whatsoever, other than what is justly due for the carriage thereof, and the additional sum of twopence for the warehouse room thereof; and if the same be not delivered to such person upon such demand, or any charge other than as aforesaid be made or received in respect thereof, every innkeeper, warehousekeeper, or other person to whose inn, warehouse, or other place such box or other article shall be brought as aforesaid, shall forfeit and pay for every such offence or overcharge, any sum not exceeding 20s. nor less than 10s. By the 7th sect. it is enacted, that if such box, &c. so directed to be left till called for, be not sent for from such place before the end of one week after the same is brought to such inn, warehouse, or other place, it shall be lawful to and for such innkeeper, warehousekeeper, or other person to charge and receive the farther sum of one penny for the warehouse-room thereof, and so in like manner if the same be not sent before the end of the second or any subsequent week, to charge the further sum of one penny weekly.

Or directed to be left till called for.

A carrier is always liable for the acts of his servants acting within the scope of his express authority, such as book-keepers, porters, warehouse receivers, &c.

2dly. Of collateral liabilities.

1. MIDDLETON v. FOWLER. M. T. 1697. K. B. 1 Salk. 282. LEVI v. WATERHOUSE. H. T. 1815. Ex. 1 Price. 280. WILLIAMS v. CRANSTON. E. T. 1817. K. B. 2 Stark. 82.

The liability of defendant, in his capacity of a common carrier, being discussed before the Court, they said—No master is chargeable with the act of his servant but when he acts in execution of the authority given him by his master, and then the act of the servant is the act of his master; and in such case the action may be brought against either the master or the servant; so either may bring *assumpsit* for the money for the carriage.

2. HYDE v. THE TRENT AND MERSEY NAVIGATION COMPANY. M. T. 1793. K. B. 5 T. R. 390. S. P. WILLIAMS v. CRANSTON. E. T. 1817. K. B. 2 Stark. N. P. C. 82.

It appeared that goods had been delivered into defendant's custody as a common carrier, to be carried from A to B.; that on their arrival at B. they were deposited in a warehouse belonging to one S. where they were accidentally consumed by fire. This action was instituted for the loss of the goods; and although it was contended that the plaintiff's only remedy was against the warehouseman, or person who had the benefit of the cartage, the Court said—There is but one contract. There is nothing like any contract, or even communication, between any other person than the owner of the goods and the carrier.

Who are always viewed, as has been already seen, as being merely the carrier's servants, even although they may receive a separate reward for their trouble; although an action may, perhaps, lie against the individual by whose misfeasance the damage is occasioned.

(d) Of their rights and Privileges. 1st. To a reward.

(1) For carriage. (a 1) Of its amount.

1. The statute 2 & 3 W. & M. c. 12. s. 24. after reciting, that whereas divers waggoners and other carriers, by combination among themselves, have raised the prices of carriage of goods, in many places, to excessive rates, to the great injury of trade, enacts, that the justices of peace of every county and other place within the realm of England, or dominion of Wales, shall have power and authority, and are hereby enjoined and required, at their next respective quarter or general sessions after Easter-day, yearly to assess and rate the prices of all land carriage of goods whatsoever to be brought into any place or places within their respective limits and jurisdiction, by any common waggoner or carrier, and the rates and assessments so made to certify to the several mayors and other chief officers of each respective market town within the limits and jurisdiction of such justices of the peace, to be hung up in some public place in every such market town, to which all persons may resort for information; and that no such common waggoner or carrier shall take for carriage of such goods and merchandize above the rates and prices so set, upon pain to forfeit for every such offence the sum of 5*l.*, to be levied by distress and sale of his and their goods, by warrant of any two justices of the peace where such waggoner or carrier shall reside, in manner aforesaid, to the use of the party grieved.

The provisions of the statute 2 & 3 W. & M. c. 12. s. 24.

And 21 Geo. 2. c. 28. s. 3. reciting the preceding provision, and farther, that no rates for the carriage of goods from distant parts of the kingdom to London, and places adjacent, had been yet settled; and that several common waggoners had thence taken occasion to enhance the price of carriage of goods to the prejudice of trade, it is enacted, that every common waggoner or carrier who shall demand and take any greater price for the bringing of goods to London, or to any place within the bills of mortality, than is settled by the justices of peace for the county or place whence such goods are brought, for the carrying goods from London to such county or place, shall, for every such offence, forfeit and pay 5*l.* to the use of the party grieved, to be recovered as by statute 3 & 4 W. & M., or by distress and sale of goods, by warrant under the hands and seals of two justices of the peace for the counties of Middlesex, Surrey, city of London or Westminster; and the respective clerks of the peace are directed, after Easter sessions, yearly, to certify to the Lord Mayor of London, and to the respective clerks of the peace for Middlesex, Surrey, and Westminster, the rates so made; which certificate, or an attested copy thereof, signed by the officer to whom the same shall be transmitted, shall be evidence of the rates and prices set for the carrying goods to any county or place.

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2. KIRKMAN V. SHAWCROSS. H. T. 1794. K. B. 6 T. R. 17.

Lord Kenyon, in delivering judgment in this case, in which he held, that an agreement entered into by a number of dyers, dressers, bleachers, &c. at a public meeting, that they would not receive any more goods to be dyed, &c. as carrier taking notice of, but on condition that they should respectively have a lien on those goods for their general balance, was good in law; and any one who, after notice of it, delivered goods to either of those persons, must be taken to have assented to those terms, and consequently could not demand goods so delivered to any such dyer, &c. without paying the balance of his general account, said—The case of carriers has also been mentioned, but that is not like this. They have no right to say that they will not receive any goods but on their own terms. I believe there is an act of parliament (2 & 3 W. & M.,) giving power to the justices of the quarter sessions to regulate the price of the carriage of goods. But be that as it may, when a carrier has given notice that he will not be answerable for goods of a particular denomination, unless he receives a certain premium, and that notice has come to the knowledge of the party suing, the Courts have considered it as an agreement binding on both parties.

So by the 30 Geo. 2. c. 22. s. 3. the justices of peace for London were authorised and directed at the general sessions holden for London next after 1st June in each year, to assess reasonable prices for the carriage of all goods taken up in London, and carried by licensed carts, &c. as well in London as from London to Westminster, and other places not exceeding three miles from London, and to frame rules for regulating such carts, &c. and the drivers thereof, and compel payment for carriage of goods by such licensed carts, &c. accordingly.

* In actions for any thing done under this act, defendant may plead the general issue, and give this act and the special matter in evidence. (See 21 G. 2. c. 28. s. 5.) And if the plaintiff is nonsuited, discontinued, or has a verdict, (3 W. & M. c. 12. s. 25.) or judgment in demurrer, (21 G. 2. c. 28. s. 5.) against him, the defendant shall have (double, 3 W. & M. c. 12. s. 25; treble, 21 G. 2. c. 28. s. 5.) costs, with the usual remedy for the same; (3 W. & M. c. 12. s. 25, and 21 G. 2. c. 28. s. 5.)

† The first act of the legislature which it has been contended affected these statutes, was the 7 Geo. 3. c. 5. which repealed so much of the several other acts there recited, as related to turnpikes; and *inter alia*; 2 & 3 W. & M.; “except so much thereof as relates to the rate or price for carriage of goods.” Then followed the 8 Geo. 3. which only introduced some fresh regulations. But neither these acts, nor the 13 Geo. 3. c. 78. which was made to explain, amend, and reduce into one act, the several statutes relating to the highways, and repealed the two preceding acts, except such parts thereof as repealed any parts of former acts, nor any subsequent parliamentary enactment, have at all infringed upon that part of the statute of W. & M. which appertain to the present subject; see 3 G. 4. c. 126. s. 1.

‡ As to how the prices of carriage of goods and passengers to and from the Isle of Wight, are ascertained, see tit. Isle of Wight; and as to vessels conveying passengers to foreign parts, see 4 Geo. 4. c. 84; and between Great Britain and Ireland, see *ib.* c. 28.

ing to such prices, and annex penalties for breach thereof, not exceeding 5*l*. for one offence, as they might deem proper, and at any other such sessions to alter and amend such rules; and by section 4. all rules made were ordered to be printed within 30 days, and affixed to some public place in London, and to be otherwise made public, as to such justices in sessions should seem fit.

4. HARRIS v. PACKWOOD. M. T. 1810. C. P. 3 Taunt. 264.

Action against a common carrier to recover the value of silk. The defendant relied partly on a notice which he had formerly given, that he should have a higher price for the carriage of that article; but chiefly on a recent advertisement by him, communicated directly to the plaintiff, announcing, that he would not be accountable for any package whatsoever above the value of 20*l*. unless entered and an insurance paid over and above the price charged for carriage, according to its value, and that no such insurance had been paid, although it was admitted that on the delivery of the goods, the extra price for that article would have been charged. At the trial, Lawrence, J. thought, "That such premium could only be considered as paid (to the defendant) for an insurance against insurable risks, and not against a loss by his own default of duty;" and plaintiff had a verdict. But upon a rule to enter a nonsuit, the Court held, that as there was no proof of express negligence to take the loss out of the contract which had been made, the rule must be absolute. It was said also, that however inconvenient it was, from the earliest period to the present hour, the cases have again and again decided, that the liability of the carrier may be restrained. Carriers are not, however, at liberty by law to charge whatever they please. He is liable by law to carry every thing which is brought to him for a reasonable price, and not to extort what he will. It would be useless to pass any such statutes to limit the price of carriage, if a carrier be at liberty to charge whatever he pleases.

(b 1) *When payable.*

WRIGHT v. SNELL. H. T. 1822. K. B. 5 B. & A. 353. JACKSON v. ROGERS. 2 Show. 327; 1 id. 104. 105. MORSE v. SLUE. H. T. 1672. K. B. 1 Vent. 238. Bull. N. P. 70. BATSON v. DONOVAN. 4 B. & A. 32; 1 Williams. Saunders. 312. a.

Per Cur. A carrier may in the first instance refuse to take charge of goods; unless previously paid the price of their carriage, or having conveyed them to their place of destination, he may decline delivering them without such previous payment.

(c 1) *Who liable for.*

MOORE v. WILSON. E. T. 1787. K. B. 1 T. R. 659. DAVIS v. JAMES. M. T. 1771. K. B. 5 Burr 2680.

In an action by the consignor for not safely carrying and delivering goods sent by the plaintiffs, the declaration alleged that the defendants undertook to carry the goods "for a certain hire and reward, to be paid by the plaintiffs;" and upon proof at the trial that the consignee had agreed to pay it, the plaintiffs were nonsuited; but on application to set aside this nonsuit, Buller, J. before whom the cause was tried, observed; that on considering the question, he found he had been mistaken in point of law; for that, whatever might be the contract between the vendor and vendee, the agreement for the carriage was between the carrier and the vendor, the latter of whom was by law liable; and the other two judges being of the same opinion, the rule was made absolute without further argument. Sed vide ante, p. 71.

(2) *For warehouse room, &c.*

1. GARSIDE v. THE PROPRIETOR OF THE TRENT NAVIGATION. E. T. 1792. K. B. 4 T. R. 581.

The Court, in noticing that a carrier incurred no liability if goods were destroyed by an accidental fire, after they were deposited in a warehouse at B., to which place the defendant had undertaken to convey certain goods, said—the keeping of the goods in a warehouse is not for the convenience of the carrier, but of the owner of the goods, for whom the journey to B. was performed; it was the interest of the carrier to get rid of them directly; and it was as such it

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But even had the legislature not interfered, the rules of common law would have prevented any exorbitant demand.

He may, however, in all cases demand a payment before he takes the goods into his custody;

And in the event of waiving such right, may maintain an action against the consignee, by agreement either express or implied.

[134] A carrier may take upon himself the responsibility of a warehouseman after the termination of his duty as a carrier, for which of course he will be entitled to be paid, but the degree of liability as such it

will be here only because there was no person ready at B. to receive these goods, that the after-noon," defendant was obliged to keep them.

2. *HYDE v. THE TRENT AND MERSEY NAVIGATION COMPANY*. E. T. 1793. K. B. 5 T. R. 339.

In this action, which was brought against defendant, as a common carrier of goods, which were destroyed by fire in a warehouse; and in which, it appeared, that he had charged and received for cartage of the same to the consignee's house at B., from the said warehouse, where he usually unloaded, but which did not belong to him; it was contended, that according to the proof, defendant could not be holden responsible, being merely a warehouseman. It was proved that the profits of the cartage were taken by a third person. It

was also established in evidence, that defendant had circulated a printed notice that he would deliver goods with the utmost punctuality. A verdict was found for the plaintiff, and a rule nisi to set it aside was now discharged by the Court, who observed: the defendants say, however, that they are warehousemen as well as carriers. That they may fill those two different characters at different times, I am ready to admit; but we deny that they can be both warehousemen and carriers at the same instant. In this case the engagement was to carry and deliver them; the goods remained in their custody as carriers the whole time. The case of *Garnide* against these defendants, *supra*, p. 134. is perfectly distinguished from the present; there the engagement on the part of the defendants was merely to carry the goods to Manchester; and having discharged their duty in carrying them to that place, their liability ceased.

(3) *For portorage.*

1. By the 1st section of the 39th Geo. 3. c. 58. it is enacted, that from and after the 5th July, 1799, no innkeeper, warehouse-keeper, or other person, to whom any box, parcel, &c. or other thing whatsoever, not exceeding 56lbs. weight, is brought by any stage, waggon, or cart, or any public stage coach, or carriage, or any porter or other person employed by such innkeeper, &c. in the portorage or delivery of any such box, &c. within the city of London and

Westminster, and the borough of Southwark, and the suburbs and liberties thereof, respectively, and other parts contiguous thereto, not exceeding the distance of half a mile from the end of the carriage pavement in the several streets and places within the said cities, &c. shall ask or demand, or receive or take, in respect of such portorage or delivery, any greater rate or price than goods with the several rates or prices hereinafter mentioned, that is to say; for any distance not exceeding a quarter of a mile, 3d. For any greater distance than half a mile, but not exceeding one mile, 6d. For any greater distance than one mile, but not exceeding one mile and a half, 8d. For any greater distance than one mile and a half, but not exceeding two miles, 10d.; and so in like manner the additional sum of 3d. for every further distance not exceeding half a mile. The second section of the same act, enacts, that if any porter or other person employed in the portorage or delivery of such boxes, &c. as aforesaid, shall ask or demand, or receive or take, of and from any person or persons, in respect of such portorage or delivery, any greater sums than the rates or pri-

And imposes penalties; for a breach of its enactments;

* "When a private man demands and receives a compensation for the bare custody of goods in his warehouse or store room, this is not properly a deposit, but a hiring of care and attention. It may be called *locatio custodiae*, and the bailee may be denominated *locator operæ*, since the vigilance and care which he lets out for pay are in truth a mental operation; whatever be his appellation either in English or Latin, he is clearly responsible, like other interested bailees, for ordinary negligence. When a person, who, if he were wholly uninterested, would be a mandatory, undertakes for a reward to perform any work, he must be considered as bound still more strongly, to use a degree of diligence adequate to the performance of it. His obligation must be rigorously construed, and he would, perhaps, be answerable for slight neglect, where no more could be required of a mandatory than ordinary exertions." Sir W. Jones's Law of Bailment, 96, 97, 98; see Peake. 113; 1 Esp. 215; 4 id. 262; Cowp. 480; 2 Salk. 462. For full information on the subject of the responsibility of warehousemen; *vide post*, tit. Warehouseman.

† From which circumstance have frequently originated difficulties, owing to the uncertainty when the carrier was to be considered as having the goods in possession in one or other of these characters.

ces hereinbefore fixed in that behalf, such porter, &c. shall forfeit a sum not exceeding 20s. nor less than 5s. By the third section of the same statute, it is enacted, that before any such box, &c. is sent from the place to which the same is brought or conveyed, there shall be made out and given to the porter or other person employed in the delivery thereof, a card or ticket, whereon shall be distinctly printed, written, or marked, the name and description of the place from whence the same is sent, and the sum due for the carriage thereof; and also the sum due for the portorage or delivery thereof, according to the rates and prices aforesaid; and the christian name and surname of the porter, or other person, employed in such delivery, which card or ticket shall be delivered by the porter or other person employed as aforesaid at the said time, and together with such box, &c.; and if any such box, &c. shall be sent from any place without such card or ticket as aforesaid, every such person shall, for every such offence, forfeit and pay any sum not exceeding 40s. nor less than 5s.; and any porter, or other person, employed in the delivery of any such box, &c. who shall not at the time of such delivery, leave therewith such card or ticket as aforesaid, or who shall wilfully alter, obliterate, or deface any thing written or expressed thereon, shall, for every such offence, forfeit and pay the sum of 40s.; and if any such porter, or other person, shall, upon the delivery of such box, &c. ask, or demand, or take, or receive, any larger sum for the carriage of such article than is written or expressed as aforesaid, every such porter or other person shall, for every such offence, forfeit and pay the sum of 20s.

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2. *REX v. DOUGLAS. H. T. 1808. K. B. 1 Campb. 212.*

It was contended in this case, which was a prosecution against a porter for obtaining money under false pretences, by counterfeiting a ticket to obtain a greater sum than the lawful charge; that as the offence certainly came within the 39 Geo. 3. the defendant ought to have been prosecuted on that statute, and not on the 30 Geo. 2. c. 24. But Lord Ellenborough said, that the remedy given by that statute was cumulative, and did not take away the remedies which before existed, either at common law or by other acts of parliament.

(Who it has been holden, may in some cases be indicted under the stat. 30. G. 2. c. 24.)

3. *REX v. DOUGLAS. H. T. 1808. K. B. 1 Campb. N. P. C. 212.*

Prosecution against a porter for obtaining money under false pretences, by counterfeiting a ticket to obtain a greater sum than the lawful charge. It was objected; against the indictment, first, that being a basket it was laid as a parcel, and it was urged that the stat. 39 Geo. 3. c. 58. specifying baskets, the indictment should have described the thing according to the fact; and Lord Ellenborough held, that it would upon that statute have been a fatal variance, but it turned out to be on the statute 30 Geo. 2. c. 24. and so the description was well enough. It was then objected, that the money was laid to have been the property of the prosecutrix, whereas it has been paid by the servant; but held, that although her having subsequently reimbursed the servant, did not make it her property at the time, so as to support such an allegation; yet as it appeared that the servant at the time had some money belonging to his mistress, it was sufficient to sustain the indictment.

The 10th section of the 39 Geo. 3. c. 58. declares, that if any person, to whom any box, &c. shall be directed, shall, upon the delivery thereof, neglect or refuse to pay to the porter, or other person employed to deliver the same, the money justly due for the carriage thereof, and also due for the portorage or delivery thereof, according to the rates aforesaid, or for the warehouse room thereof, (see the clauses as to warehouse room as the case may be, it shall and may be lawful, to and for any justice of the peace, within whose jurisdiction such neglect or refusal shall be made, or the person charged with such offence shall reside, upon complaint thereof made, to grant a warrant to bring before him the person against whom such complaint shall be made; and upon proof thereof made upon oath, (which oath such justice is hereby empowered to administer) to award reasonable satisfaction to the party grieved for his damage and costs, and for his loss of time in recovering the same; and on nonpayment of the sum so awarded by warrant under his hand and seal to levy the same

Or of the receiver;

[137] by distress and sale of the goods and chattels of the offender, rendering to such offender the overplus of such distress, if any there be, after deducting the charges of making the same.

The 11th section of this statute provides that no person shall be prosecuted for any offence against this act, unless information against such offence be given to a justice of the peace, within 14 days next after the commission of such offence.

By the 12th section of this act it is declared, that nothing in this act contained shall extend, or be construed to extend, to authorise the employment of any porter or other person, in the portorage or delivery of parcels within the city of London, contrary to the laws and usages of the said city.

2d. *Of their Lien. Vide post Lien.*

(c) *Of their disabilities.**

1. By 3 Car. 1 c. 1. which was passed for the reformation of sundry abuses committed on the Lord's Day, commonly called Sunday, it was enacted, that no carrier with any horse or horses, nor waggonmen with any waggon or waggons, nor carmen with any cart or carts, nor wainmen with any wain or wains, should, after 40 days next after the then session of parliament, by themselves or any other, travel upon the said day, upon pain that every person so offending, should lose and forfeit 20s. for every such offence.

2. *Ex parte* MIDDLETON. T. T. 1824. K. B. 8 B. & C. 164; S. C. 4 D. & R. 824.

A motion was made for a *certiorari* to remove a conviction before the justices of a borough under stat. 3 Car. 1 c. 4. passed for the purpose of "reforming abuses on the Lord's Day, commonly, &c." The defendant was stopped while driving a van, of which he was carter, travelling to and from London to York, and convicted as a carrier within the meaning of the above statute. It was urged for the rule, that the conviction of persons under circumstances like the present, would lead to great inconvenience, as the intercourse of both goods and persons would be interrupted. But the court held that their policy of preserving regularity on Sundays was sufficient to bring the defendant within the terms of the act—Rule refused. See *Drury v. Defontaine*, 1 Taunt. 131; and 3 B. & C. 232.

II. OF COMMON CARRIERS BY WATER.†

(A) WHO ARE OR ARE NOT SUCH CARRIERS.

(a) *Bargemen.*

RICH V. KNEELAND. K. B. 1612. Cro Jac. 330; S. C. Hobart. 18; S. C. 1 Roll. Abr. 2. 124, id. 367 AMIES V. STEVENS. M. T. 1765. K. B. 1 Stra. 128; S. P. 2 Bulstr. 280; 2 Roll. Abr. 567.

Action against a common bargeman for losing a portmanteau; and after judgment given against defendant upon the issue, whether plaintiff discharged defendant of the carriage; error was brought, and assigned, that the action lay not against a common bargeman, without special promise; but all the justices and barons held "that it well lies as against a common carrier upon land."

(b) *Boatmen.*

LOVETT V. HOBBS. T. T. 1679. K. B. 2 Show. 128.

*The 21 Geo. 2. c. 28. s. 4. disables the owners of any waggon, wain, or cart, from acting in that capacity, unless he cause to be painted, on some conspicuous part thereof, his christian and surname, and place of abode, in large legible letters, and continue the same thereupon; and, by the same act, the owner of every common stage, waggon, or cart, employed as travelling stages from town to town, shall, besides, paint "common stage waggon" or "cart," as the case may be, on pain of forfeiting not exceeding 5l. nor less than 20s. to be recovered as directed in section 8; *vide ante*, p. 131 and 132; see 13 G. 3. c. 78. s. 59; and *Rex v. Powell, post*, p. 197.

† The particular rules of law which, it has been already seen, apply to the case of carriers by land, are, with equal rigour enforced in the case of carriers by water, whose protections have not been introduced by the legislature in favour of such parties, or their general duties varied in some degree by the different nature of the element upon which they are performed.

Per Cur. The owner of a Gravesend boat, which carries both men and Boatmen; goods, is a common carrier.

2. It seems that the owners of the Dublin packet boats, which carry the mail from Dublin to Holyhead, and the like, are common carriers, and as such liable for the loss of the luggage of the passengers, or any damage which it may sustain whilst in their custody, the same as other common carriers. This point does not appear to have received any other judicial determination; see *Nicholson v. Willan*. 5 East. 507; though it is one about which no great doubt can, it seems, at this day, be entertained; see *Lawes on Charterparties*, p. 347.

Such as the owners of the Dublin packetboats

(c) *Ferryman*,

BANCROFT'S CASE. All 93. *S. P. CHURCHMAN v. TUNSTALL*. Hardres. 163.

Case against a ferryman for throwing a box (of which he did not know the contents, but in reality it contained jewels) into the sea, on a sudden storm arising on the passage; and it was resolved that he should answer for it.

Sed vide Rob. Ent. 103; *Molloy*. 209. 210; 1 *Rol.* 79; 2 *Bulstr.* 280; *Dyer*. 158; 1 *Rol. Abr.* 3. (F) vol. 1; 1 *Hawk. P. C.* 225; s. 2. fo. edit. 21; *H. 6. 55.* 56; 1 *Salk.* 18; 1 *Lord Raym.* 654; 12 *Mod.* 484; 5 *T. R.* 149. 150.

(d) *Hoymen*.

Hoymen by the custom of the realm, are bound to keep and deliver goods safely, for their hire is also due by custom; see 1 *Roll Abr. c.* 2 15; 1 *Sid.* 36; *Hob* 18. [139]

(e) *Keelmen*.

DALE v. HALL. M. T. 1750. K. B. 1 *Wils.* 181.

Hoymen;

Per Cur. A keelman is responsible for negligence in the care of goods, to the same extent as common carriers by water in general are.

(f) *Lightermen*.

In the case of the East India Company v. Pullen, abridged, ante, p. 68, it was holden that a lighterman was a common carrier.

(g) *Masters of vessels*.

MORSE v. SLUB. M. T. 1671. K. B. 1 *Vent.* 190. 238; 2 *Lev.* 69; *Sir T. Raym.* 220; 1 *Mod.* 85; 3 *Keb.* 72. 112. 135; *DALE v. HALL*. M. T. 1750. K. B. 1 *Wils.* 281. *GOFF v. CLINKARD*. cited *ibid*.

Lightermen

This was an action brought against the master of a vessel, for the loss of goods, which happened without his default; it was objected that the action should have been brought against the owners of the vessel, and not against the master, who was no more than a servant to them at a certain salary; but the court decided that he was responsible as master; 1st, because he takes a reward, and the usage is, that half wages is always paid him before he goes out of the country; 2d, that he may make a reserve and caution for himself; 3d, that no difference can be assigned between him and a hoyman, common carrier, or inn-holder; 4th, that he is rather an officer than a servant, having power to impawn the ship, and to sell *bona peritura*.* See *Molloy*, 209. 210.

Masters;

(h) *Owners of vessels*.

1. *BOSON v. SANDFORD*. M. T. 1688. K. B. 2 *Salk.* 439; *S. C.* 3 *Lev.* 258; *S. C.* *Carth.* 62; *S. C.* 1 *Show.* 29; 2 *id.* 478; *Skin.* 278; 3 *Mod.* 321. *S. P. ELLIS v. TURNER*. 8 *T. R.* 531; *S. P. YATES v. HALL*. M. T. 1785. K. B. 1 *T. R.* 78; *Abbott on Shipping*, 102. 108.

Case against two of several part owners of a ship. The court held that the action was *quasi contractu*, and not *ex delicto*, and judgment was given for the defendants, because all were not joined. But *Holt, C. J.* said, that it was at the election of the plaintiff either to bring an action against the master or the owners; as in case of mariners' wages the action lies against master or owners, and the master or owners may maintain an action for freight; See *Fry v. Marsh*, cited *Carth* 52; *Rice v. Shute*, 5 *Burr.* 2613; and *Abbott v. Smith*, 2 *Bl. R.* 947. [140]

* In effect too, his reward is paid by the merchants on the same condition as freight is to the owner; viz. that such freight is earned; without which his wages would not be due. Many cases might besides be adduced to show that a deputy, though he be nominally the servant yet if he really be a distinct officer, is liable for negligence in his office, as much as if he were to all intents the principal. For instance, the deputy postmaster has been holden liable for negligence, in not delivering a letter, ante p. 65. It seems also to be upon this principle, that it is laid down by the court, that the gaoler may be charged for an escape, tho' the sheriff be also liable; but the turnkey cannot, for he is a mere servant; see 1 *Vent.* 288; and post tit. *Errato*.

Or rather
actual pos-
sessions of
vessels.

2. JAMES V. JONES. T. T. 1708. K. B. 3 Esp. N. P. C. 27.

Case against the owners of a ship for not delivering goods, shipped on board; but it appearing that the owners had chartered the vessel, Lord Kenyon held, that although the defendants were owners, yet no express contract being proved with them, and the ship having been in fact chartered for that voyage by them to other persons, those persons were for that voyage to be deemed as the owners, and the captain as their agent. *pro hac vice*, the liability being shifted by the charter party from one party to the other. See 2 N. R. 182.

(i) *Watermen.*

1. LOVETT V. HOBBS. T. T. 1679. K. B. 2 Show. 128.

Per Cur. Watermen who carry both passengers and goods, are, to all intents and purposes, common carriers as much as stage-coachmen.

2. BOUCHER V. LAWSON. H. T. 1735. K. B. Ca. Temp. Hard. 194.

This case, which was an action for the non-delivery of goods, by an owner of a vessel, entrusted to the master of such ship in the river Tagus to London, was argued once in Hilary term, 1734 (Ca. Temp. Hard. 85,) and again in Trinity Term of the same year. It is unnecessary, for the sake of elucidating the doctrine contained in the margin to state the facts at any length, as what is pertinent to the subject may be collected from the following observations of Lord Hardwicke, C. J. in delivering his opinion in the said Trinity term. One thing, said he, occurs to me on reading this record, which has not been spoken to; there are few cases of this sort reported, only two principal ones; only *Morse v. Slue*, ante, p. 139; and *Boson v. Sandford*, ante, p. 139; the first was an action against the master only, and the opinion was, that it lay either against the master or owners, and the declaration in that case was founded on the custom of the realm in general; in *Boson v. Sandford*, as appears by *Cartew*, the declaration lays the ship to be a ship usually carrying goods for hire, and thereupon the declaration is founded. In this case the declaration is different from both; for the first count, on which the verdict is given, is, that the plaintiff caused to be delivered and laden on board the said ship, several goods and merchandizes to be safely carried to London, there to be delivered to the said Boucher, he paying freight; and that the defendant, having received the goods into his custody, undertook to carry them safely; and that the ship arrived, and plaintiff is ready to pay the freight, but defendant refuses to deliver the goods. Now here no custom of the realm is laid, nor that it was a ship usually carrying for hire, but a special undertaking of the defendant; nor has the verdict found any thing more. So then the question is whether this case comes up to either *Morse* and *Slew*, or to *Boson* and *Sandford*; for the undertaking is only thus far verified by the verdict, that the ship being in the Tagus, the master took the goods on board by the lading; and, therefore, it deserves to be considered, whether, if a ship be sent for a particular purpose, and not in the general way of trade, the master can take in goods to charge the owners, and if so, whether something further should have been shown in this declaration, and found by the verdict. For on this record, if we give judgment for plaintiff we must say that in all cases, even though the ship be sent for a particular purpose, and not in the general way of trade, the master can take in goods to charge the owners. Upon the case being now brought forward again, he gave final judgment as follows; what determines my opinion, is the point which occurred upon comparing this declaration with those in *Morse v. Slue*, and *Boson v. Sandford*; for I think that upon this declaration taken with the verdict, judgment must be for the defendant. The question is, whether sufficient appears in this case to charge the defendant. Now he must be charged upon the custom of the realm, as usually carrying for hire, or else by his express undertaking. As to the custom of the realm, it is not now necessary it should be set out in the declaration, though all the old entries are so, but that being reckoned part of the common law, is not therefore necessary to be alleged; but yet the plaintiff must prove a sufficient case within the custom, and upon all general verdicts the court will take such a case to have been proved; but this being a special verdict, we are only to take the case to be as it is found; and I think the case now found is not within the custom; for it is not found

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to be a ship usually carrying for hire, nor that it was employed in this case to carry according to custom. In the case of *Coggs and Barnard*, 1 Salk. 26. the great doubt was, whether some consideration should not have been laid; and the court held, that the defendant having undertaken, he was answerable for the misfeasance, but that was by reason of the personal undertaking, and it would have been an action to charge the master for his servant. Nothing appears here of any personal undertaking in the owner, but only an undertaking of the servant, which can only charge the owner by the custom, and as to the case of *Brandon and Peacock*, (cited Ca. Temp. Hard. p. 86,) that was a general verdict; so that the court was bound to take a sufficient case to have appeared before the jury. This is no reason why these cases should be carried any further than they have been already. So I think defendant must have judgment.

(j) Wharfinger.

1. *MAVING v. TODD*. T. T. 1815. K. B. 1 Stark N. P. C. 72; S. C. 4 Camp. 225.

And it has been held on;

Action against the defendants, as wharfingers, to recover the value of goods destroyed on defendant's premises by fire. The question was, whether the defendants, whose duty it was to convey the goods from the wharf in their own lighters to the vessel in the river, were liable for the loss. Lord Ellenborough was of opinion that the liability of a wharfinger, while he has possession of the goods; was similar to that of a carrier.

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2. *ROSS v. JOHNSON AND DAWSON*. H. T. 1772. K. B. 5 Burr. 2825.

Lord Mansfield, in this case, said—it is impossible to make a distinction between a wharfinger and a common carrier. They both receive the goods upon a contract. Every case against a carrier is like the same case against a wharfinger.

For a length of time; that wharfingers are liable as common carriers;

3. *MAVING v. TODD*. T. T. 1815. K. B. 1 Stark N. P. C. 72. S. C. 4 Camp. N. P. C. 225.

And are on the one hand, subject to the same disabilities; and on the other, entitled to the same privileges as common carriers in general.

This was an action against a wharfinger for loss of goods, as stated supra, p. 141. During the trial a notice limiting his responsibility was given in evidence, the object of which the judge upheld, and said—The plaintiff must be nonsuited. Fire is such a terrible calamity, that it is reasonable the mere depository of goods should be enabled to guard against it, and to throw the risk entirely upon the owners. See 5 Esp. 41.

(B) OF THE DELIVERY OF THE GOODS.

1. In a former part of this title, when considering the delivery of goods to a carrier by land, the rules which govern the law on this subject, and which establish the various principles collaterally connected with this division, were fully stated. It will be, therefore, unnecessary to advert again to the different cases which have been decided, as the delivery of goods to carriers by water is guided by the same doctrines as were there expounded. Upon reference to that part of the work, it will be seen what has been considered a sufficient delivery to the carrier. 1st. As respects the mode of delivery; *ante*, p. 66. 2d. As respects the state of the goods when delivered; *ante*, p. 69; and what the effect of the delivery is: 1st As respects the right of the carrier; *ante*, p. 70. 2d. As respects the right of the consignor and consignee, both considered generally; *ante* p. 71; and with reference to the Statute of Frauds, see *post*, tit. Stat. of Frauds.

The rules applicable to the delivery of goods to common carriers by water have been already fully discussed, the same principles apply to water and land carriers in this respect.

2. *COBBAN v. DOWNE*. T. T. 1803. K. B. 5 Esp. N. P. C. 41.

Action against a wharfinger for the loss of a truss which was to be forwarded coastwise. The usage of the wharf, which was in London, appeared to be, to deliver the goods on the wharf to the mate of the ship by which they were to be carried. Lord Ellenborough said. The duty of a wharfinger is to be measured by the usage and practice of others in similar situations, or his known and professed liability. The defendant has proved, that by established usage, the goods are delivered by the wharfinger to the mate and crew of the vessel which is to carry them, from which time, it has been considered, that their responsibility is at an end; but the delivery must be to an officer, or person accredited on board the ship; it cannot be to the crew at random; but the mate is such a recognized officer on board the ship, that delivery to him is a good wharfinger

It may be, however, here necessary to notice the case of *Cobban v. Downe* where it was held, that where goods are sent to a

[143] delivery, and the responsibility of the ship attaches, if the jury believe that the mate received the goods, as stated by the defendant's witnesses; and if they were once delivered to the mate, their being lost on the wharf cannot affect the wharfinger.—Verdict for defendant.

ed to, and received by the mate of the ship, it will be a good delivery to charge the ship-owner, though the goods were lost before actually placed on board.*

(C) OF THEIR DUTIES AND LIABILITIES.† (a) Of direct liabilities.

1st. Previous to the commencement of their journey.

Carriers being, as has been shown, ante, p. 80. servants of the public; they are, from the very nature of their occupation, equally bound, with carriers by land, to undertake the care of goods brought to them to be deposited under their care and protection, until they arrive at their place of destination. And, amongst other things, it seems that they must sail at or about the appointed time, or in a reasonable time after the goods are shipped.

2d. Subsequent to the commencement of their journey.

1. Of their obligation to carry safely. (a 1) In general.‡

1. In all cases of losses of goods entrusted to the care of those who, it has been seen, come under the denomination of common carriers, by water; ante, p. 138. whether such losses are occasioned by robbery, ante, p. 86; or fire, ante, p. 87; or in the case of a loss or damage happening by any accidental cause whatever, however impossible it may be for human sight to guard against it; ante, p. 86. these parties will be liable to make good any loss or damage (not excepted by act of parliament,) sustained, unless it happen by the act of God, or of the king's enemies; or, (as will be hereafter seen) other accident expressly excepted by the bill of lading or by notice of advertisement, or there be some other evidence of an express or more limited contract; or by any mode which may indicate the intention of the party not to risk the whole extent of the general common law obligation. act of God, or of the king's enemies, or the extent of their liability be limited by any of means hereafter mentioned; or if in the case of owners or masters of vessels restrained by parliamentary enactments.

2. Although a common carrier by water's responsibility is partly governed by principles of public policy, the courts have always recognized the existence of a contract; ante, p. 83. He is therefore liable either in case of an express or implied breach of contract; such as not providing proper vessels for the goods; ante, p. 84; *et ride*, Abbott on Shipping, 231. 4th edit.; but it will only be requisite to provide such as would, without any extraordinary accident, perform the voyage; ante, p. 84. And it is sufficient if the vessel be so at the time of her sailing. See Doug. 733; Park on Ins. 333; see also 1 Dow. 336; 2 Dow, 23.

[144] 3. DALE v. HALL. M. T. 1750. K. B. 1 Wils. 281; 1 Salk. 18; 1 Vent. 190. 238. S. P. DAVISON v. GWYNNE. 12 East. 381.

This was an action against a common carrier by water, charging the defendant with negligence. It was holden to be no defence that the ship was tight when the goods were placed on board, but that a rat, by gnawing out the oakum, had made a small hole, through which the water gushed on the ground that whatever was not excused by law was to be deemed a negligence in the carrier, and that he was answerable in all events, except where the goods were damaged by the act of God or the king's enemies. See Abb. on Shipping, 255.

(b 1) When it terminates; *vide ante*, p. 87.

(c 1) How limited.

(a2) By special acceptance.

It has been before stated, ante, p. 92. that a common carrier by land may limit his responsibility by making a special acceptance of the goods. In the

* The manner of taking goods on board, and the commencement of the master's duty in this respect, depend, in all instances, on the custom of the particular place,

† For information on the existing law as appertaining to the conveyance of passengers in merchant ships, see 4 G. 4. c. 116.

‡ The express contracts which ship owners enter into as common carriers of goods, and the various duties which they are held bound to perform in compliance with the commercial codes of his and other nations, will be examined under the subsequent titles of Charter party; Lading, Bills of; and Ship and Shipping.

case of carriers by water this is often done with more latitude, and with greater facility than in the former case, and more frequently happens, as bills of lading are in general entered into by the agent of the owners of the ships conveying merchandize from one port to another, in which they have an opportunity of absolving themselves from those extraordinary hazards or casualties of which prudence may suggest the impropriety of risking the occurrence. Formerly, the only exception contained in bills of lading was against the perils of the sea;* but in late times, captains and ship owners have more wisely and properly extended the exception to the acts of God or the king's enemies, fire and all other dangers and accidents of the seas, rivers, and navigation.†

(b 2) *By public notices.*

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PERL V. PRICE. T. T 1815. C. P. 4 Campb. N. P. C. 243.

Per Gibbs, C. J. When a card has been published, advertising a ship for a specific voyage, if that be altered, I am of opinion that the owners are bound to give particular notice of the alteration to all persons who afterwards ship goods on board the vessel, and that they are otherwise answerable for the loss which they sustain by supposing that the destination of the vessel remains unaltered; see the cases applicable to public notices, in general, abridged *ante*, p. 94. &c. &c.

*Upon the general exception of perils of the sea, it was determined in the case of *Pickering v Barclay* (2 Rol Abr 248. pl. 10 Sty. 182.) where the ship had been overpowered and plundered on the high seas by pirates, that the owners were not answerable for the loss of goods under such circumstances; see Comb. 56; and 1 Vent 190. In the case of *Bever v. Tomlinson*, (Abbott, 268,) which came before the Court of King's Bench, and which was an action brought to recover the value of goods, for which the master had signed a bill of lading, containing an exception only of the perils of the sea, although made during the time of war, and which goods were lost in consequence of the ship being designedly struck by the vessel of an enemy; it was doubted by the court, whether a loss so occasioned was within the meaning of this exception; but it is said that the cause never proceeded to a final judgment. So in the case of *Buller v. Fisher*, (Abbott, 268, and 3 Esp. 67,) where it appeared that the ship in which the goods were conveyed, was run down in daylight, and not in a tempest, by one of two other ships that were sailing in an opposite direction to her, both of which kept to windward, as did also the defendant's ship, but it was a matter of so much doubt whether the master of the defendant's ship ought to have understood the course which the other would pursue, and have borne leeward to avoid them; and no blame was considered to be imputable to him for not having done so, nor was any fault attributable to the persons who had the conduct of either of the other ships; the loss was holden to fall within the meaning of this exception, and to have happened by a peril of the sea. And where a ship is run down by another, not through design, but negligence, the loss is a peril of the sea; 4 Taunt. 126. So where a loss arises from the men belonging to her being sent on shore, and impressed; 2 N. R. 336. So a damage by the vessel being taken in tow or by bearing up to a king's ship under signal under an unauthorised command, is a peril of the sea, see 2 Campb. 350, 1 Stark. 157. But a loss by bearing down on a beach, within the tideway, to repair, and being damaged, is not, 3 Taunt. 227; nor a destruction of the vessel by worms at sea; 1 Esp. 445; nor loss happening by mistake of the captain; Park, 88. But in the case of *Smith v. Shepherd* (Abbott, 268,) the Court went so far as to determine that accidents arising from robbery, leakage, fire, or from a ship accidentally driving against a bank at the entrance of a harbour, did not fall within the terms of such exception. (The decision of this last case occasioned considerable alarm amongst ship owners, and they accordingly altered the form of their bills of lading from the original exceptions of "dangers of the sea," to the exception "of all and every other dangers and accidents of the seas, rivers, and navigations, of whatever nature and kind soever.") So it is said that every loss proceeding directly from natural causes is not to be considered as happening by a peril of the sea; (Abb. 265.) If a ship perish in consequence of striking against a rock or shallow, the circumstances under which the event takes place must be ascertained, in order to decide whether it happened by a peril of the sea, or by the fault of the master. On the other hand, if a ship is forced upon such a rock or shallow by adverse winds or tempest, or if the shallow was occasioned by a sudden and recent collection of sand in a place where ships could before sail in safety, the loss is to be attributed to the act of God, or the perils of the sea. See these cases abridged, post, tit. Charterparty.

† Under these circumstances, those carriers who enter into such special contracts ought to understand, and consider the meaning and effect of the bill of lading before they sign it, and particularly any written words which may be introduced by the merchant as an addition to, or alteration of, the printed form; for though the printed as well as the written stipulations, all equally form part of the contract, yet the latter being specially introduced, and in general expressing the particular object of the contracting parties, courts are always disposed to give them their fullest effect. For further information on this point, *vide post*, tit. Lading, Bill of.

And not only have the legislature restrained [143] the liability of owners and masters of vessels by the Pilot Act;

But by the stat. 7 Geo. 2. the owners are declared to be irresponsible for more than the value of the ship and freight, in any case of loss arising from the fraud, embezzlement, or treachery of the master or mariners.

Within which, it [147] has been holden, a loss by robbery comes in which one of the mariners is concerned, by giving intelligence and afterwards sharing the spoil.

(c 2) *By statute.**

1. By 6 Geo. 4. c. 125. s. 53. it is enacted, that no owner or master of any ship or vessel shall be answerable for any loss or damage which shall happen to any person whatsoever, from or by reason or means of no licensed pilot being on board of any such ship or vessel, or of no duly qualified pilot being on board thereof, unless it shall be proved, that the want of such licensed or of such duly qualified pilot, respectively, shall have arisen from any refusal to take such licensed or qualified pilot on board, or from the wilful neglect of the master of such ship or vessel in not heaving to, or using all practicable means consistent with her safety, for the purpose of taking on board thereof any pilot who shall be ready, and offer to take charge of the same. Provided by sect. 54. that nothing in this act contained shall extend, or be construed to extend, to make the owner of any ship or vessel liable, in any such case, for any loss or damage beyond the value of such ship or vessel, and her appurtenances, and the freight due, or to grow due for and during the voyage wherein such loss or damage may happen or arise. And sect. 55. declares, that no owner or master of any ship or vessel shall be answerable for any loss or damage which shall happen to any person whomsoever, from, or by reason or means of any neglect, default, incompetency, or incapacity of any licensed pilot, acting in the charge of any such ship or vessel, under or in pursuance of any of the provisions of this act, where and so long as such pilot shall be duly qualified to have the charge of such ship or vessel, or where and so long as no duly qualified pilot shall have offered to take charge thereof.

2. By stat. 7. Geo. 2. c. 15. s. 1. it is enacted, that the owners of vessels shall not be liable for any loss or damage by reason of any embezzlement, secreting, or making away with (by the master or mariners,) of any goods shipped on board any vessel, or for any act, matter, or thing, damage, or forfeiture, done, occasioned, or incurred by the master or mariners, or any of them, without the privity and knowledge of the owners, farther than the value of the vessel, with the appurtenances, and freight for the voyage wherein the embezzlement, &c. shall be made.

3. SUTTON v. MITCHELL. M. T. 1785. K. B. 1 T. R. 18.

Action against ship-owner, to recover value of property intrusted to his care, and taken during the night, by force, by a number of fresh-water pirates, as the vessel lay at anchor in the Thames. Defendant relied on 7 Geo. 2. proving that one of the mariners was accessory to the robbery by giving intelligence, and that he afterwards shared the spoil. The Court thought that the case was within the act, and, consequently, that defendant was not liable beyond the value of the vessel and freight.

4. The 26 Geo. 3. c. 86. s. 1. has confined the liability of the owners of vessels for any loss or damage by reason of any robbery, embezzlement, &c., without the privity of the owners, to the value of the vessel and freight, *although the master and mariners are not concerned in, or privy to, such robbery, embezzlement, &c.* The 2d section exempts owners of vessels entirely from answering for any loss by fire. And by the 3d section, the owners of vessels

* It may, at first sight, appear extraordinary, from the similarity and nature of the employment of carriers by water, when compared with carriers by land, and the consequent liability, that from regard to public convenience and necessity, they would have otherwise incurred in case of any loss of the property of others in their possession, whether occasioned by one cause or another, the legislature should have specifically interfered to relieve the former from the degree and extent of responsibility that attaches to the latter; but upon an examination of the risks carriers by water run, and the superior collateral rights and privileges which carriers by land in some cases enjoy, by the exercise of which they may protect themselves against any absolute loss, this parliamentary interference may be substantially justified. In the first place, their particular situation affords greater facility for treachery and fraud, in the persons they necessarily employ; and, 2dly, they have no remedy against the acts of pirates, &c. as land carriers have against robbers—by an action against the hundred. Besides, the legislature, in thus limiting their responsibility, have proceeded on the same policy as dictated the first introduction of the navigation acts, to encourage the vesting of capital in shipping, by restricting the responsibility of ship owners to the amount of the capital embarked.

shall not be liable to answer for any loss happening to any gold, silver, diamonds, watches, jewels, or precious stones, by reason of any robbery, embezzlement, making away with, or secreting thereof, unless the owner or shipper, at the time of shipping, insert in his bill of lading, or otherwise declare in writing to the master or owner of the vessel, the nature, value, and quality of such gold, &c. The 4th section directs the mode of proceeding, in equity, for a discovery of the losses, and apportionment of the value of the vessel and amount of freight, provided that such value and freight are not sufficient to make the freighter or proprietor full compensation, so that these parties should receive satisfaction in average.

5. The last act diminishing the liability of ship-owners is the 53 Geo. 3. c. 159. This statute was passed to amend the 7 Geo. 2. c. 15. and the 26 Geo. 3. c. 86. and further to limit the responsibility of ship-owners in certain cases, and more especially for the acts of their servants. The several provisions of this statute enact, in substance, 1st, that owners, and part owners of ships, shall not be liable to make good any loss, or damage to any goods or merchandise laden on board their ships, beyond the value of the vessel and freight, provided such damage should be occasioned without their fault or privity. By the next section there is a legislative exposition of what is to be considered as freight, which the previous statutes had left in general and loose terms. The value of the carriage of goods and merchandise though belonging to owners and part owners, is to be considered within the meaning of the term freight, and also the hire of the vessel due, or to grow due, by virtue of any contract, whether on behalf of his majesty, or of any person or persons, or any body politic or corporate. The act then provides for separate losses. The act next proceeds to except the owners of lighters, barges, boats, &c. employed in inland navigation, and ships and vessels not duly registered.

6. WILSON V. DICKSON AND OTHERS. M. T. 1818 K. B. 2 B. & A. 2.

This was a special action on the case brought by the plaintiff against the defendants as joint owners of a ship, on account of the loss of certain goods therein laden, belonging to the plaintiff. The nature of the loss was the improper sale by one of the defendants, the captain and part owner of those goods in the course of the voyage. The cause was referred, and the arbitrator by his award submitted for the consideration of the Court three questions which arise upon the 53 Geo. 3. c. 159. 1st, Whether, inasmuch as the master of the ship was in this instance a part owner, the case was within the words of the statute *vide supra*, p. 147. The next question that arose, was, admitting the case to be within the statute, at what period the value of the ship was to be taken; whether at the time the cargo being put on board, or at the time the cause of action arose; viz. at the time of the loss; and 3dly, whether in calculating the value of freight due, or to grow due, money actually paid in advance was to be included. Upon these points coming on to be argued before the Court, it was contended for the plaintiff, that as far as respected the rights of third persons, the ownership was entire, and the loss having been occasioned by the act, and with the privity of one, must be taken to have been by the act and with the privity of all; and in that case the defendants did not come within the protection of the act; that supposing, however, that the case was within the statute, and that the owners were answerable only for the value of the ship and freight; that value must be taken at the time of the shipment, and not of the loss; as it was the former value only, which the shipper looked to, and trusted as the fund to indemnify him against loss; and that as to the third

* It would seem, that it has been considered, that the owners of a gabbert navigating the Clyde, would be liable within this statute, in case of loss by fire occasioned by a violation of the regulations of the Port of Greenock, prohibiting the kindling fires on board any vessel within the limits of that harbour, the above statute only relating to ships and vessels occupied in sea voyages; Hunter v. Gowen, 1 Bligh 579. Since the passing of the 53 Geo. 3. *vide supra*, no doubt can exist with reference to this question.

† None of these acts affect the liability of masters and mariners, notwithstanding such master or mariner may be an owner, or part owner; see 7 Geo. 2. c. 15. s. 4; 26 Geo. 3. c. 8. s. 5; 53 Geo. 3. c. 159. s. 4.

was, that if point, it was clear that the words "freight due, or to grow due," must mean a sole owner the freight earned during the voyage. The Court gave judgment upon the several points as follows.

1st. The object of the legislature in passing the 53 Geo. 3. c. 159. was to assimilate the law of England to that which had long been the law of other commercial countries; and the great principle was, to limit the responsibility of the several part owners to the amount of their respective capitals embarked in the ship; for although it is said, that the object of the act was to protect the owners against the acts of their servants, and not against their own acts; that this is a loss occasioned by one of several partners, and that therefore the whole are liable; such argument proceeds upon this erroneous supposition, and which was the very object of the act to guard against, by confirming, if possible, that which had been long the general law of Europe; that part owners, though jointly liable to the persons with whom they contract, on account of the ship, yet in many respects stand in a different situation from that of partners; and for this amongst other reasons, that the owners of a ship cannot, like partners in general, select with whom they will be in partnership; each having an influence in proportion to the quantity of his interest; a smaller proprietor may be, therefore, outvoted by the larger, who may even appoint himself. This appears to be the true construction of this statute, not only from an examination of those enactments in *pari materia*, for the words introduced into the 53 Geo. 3. "part owner or owners," and which were not inserted in the previous statute of 7 Geo. 2. c. 15. evidence an anxiety on the part of the legislature to explain the words "owner or owners," used in the 7 Geo. 2. c. 15. and to give a protection to *part* owners, which might not have been given under the general words *owner or owners*; but also from the fourth section of the very act itself, which expressly provides in the case of a master or mariner being part owner, that his responsibility as master or mariner shall, notwithstanding that circumstance, continue. The defendants, are not, therefore, liable beyond the ship and freight.

[149] Geo. 3. "part owner or owners," and which were not inserted in the previous statute of 7 Geo. 2. c. 15. evidence an anxiety on the part of the legislature to explain the words "owner or owners," used in the 7 Geo. 2. c. 15. and to give a protection to *part* owners, which might not have been given under the general words *owner or owners*; but also from the fourth section of the very act itself, which expressly provides in the case of a master or mariner being part owner, that his responsibility as master or mariner shall, notwithstanding that circumstance, continue. The defendants, are not, therefore, liable beyond the ship and freight.

Under this act it has been also decided, that the value of the ship is to be calculated at the time of the loss, and not at the time of the commencement of the voyage. 2dly. Having decided that this is a case within the act, we come to the second point, and upon that we are also of opinion against the plaintiff. The value must be taken at the time of the loss, and not of the shipment. The words are, "further than the value of his or their ship or vessel, or the freight due, or to grow due, during the voyage which may be in prosecution, or contracted for at the time of such loss or damage." It has been argued, that the words, "at the time of loss or damage," refer to the whole antecedent words, not only to the freight due, or to grow due, but also to the words, "their ship or vessel." It seems to us, however, that they apply to the words, "the voyage, which connexion is evidently intended; for upon looking at the 7 Geo. 2. we find that these words were substituted in lieu of the words, "wherein such embezzlement shall be made, permitted, or done," used in the 1st section of the 15th chapter of that act, which has the following words, "the full amount of the freight due, or to grow due, for and during the voyage, wherein such embezzlement shall be made, permitted, or done," from which it is clear, that as in the statute of 7 Geo. 2. the words which were not retained in the statute of Geo. 3. can only refer to the term "voyage;" the words inserted in their place must be similarly explained. But if we attend to the term freight, as used in the act, we shall be still further borne out in the view we have taken of the case; for with respect to freight, the legislature contemplated two periods of time, viz. freight due at the time of the loss; and freight due at the conclusion of the voyage; and if they had intended that the value of the ship was to be taken at two periods also, or at a period different from that of the loss, they would have used words to express their intention in that respect. The argument that the freighters look to the apparent value of the ship at the time of the shipment, as the fund to indemnify them, wholly fails, upon considering the entire clause; for the statute contemplates not only the case of damage to goods shipped on board, but also damage done to any other ship; that argument, therefore, clearly does not apply to the case contemplated in the lat-

ter part of the clause; yet the limitation of responsibility is exactly the same in both cases. The words "the value of his or their ship or vessel," must, consequently, unless there are some other words to control them, mean the existing value at the time when the loss takes place. That is, however, mere matter of evidence; and when the exact time of the happening of the injury is uncertain, the plaintiff may launch a *prima facie* case by showing the value at the time of sailing, leaving it to the opposite party to show what deterioration had taken place. [150]

3dly. It is clear that the words "freight due, or to grow due," as used in the act, must mean the freight earned during the voyage; for that is the value of the freight to the owners; and it seems to us that it ought to make no difference with respect to the owner's responsibility, whether the freight be in his own pocket, or in that of the person who would have to pay for it. The freight paid in anticipation must consequently be taken into account. And that in estimating the value of freight due, or to grow due, money actually paid in advance is to be included ed.

(d 1) *How nullified.*

(a 2) *By party's own acts, vide ante p. 117, &c.*

(b 2) *By act of God, vide ante, p. 124.*

(c 2) *By act of king's enemies, vide ante, p. 125.*

3dly. *After the termination of their journey.*

1. *Of their obligation to deliver.*

The various *dicta* which were formerly the only guide in an examination of the *vera a questio* of whether a common carrier of goods is bound to deliver such property at the houses of the persons to whom they are directed. and the latter opinions of the Court, which have more specifically decided the question, have been already brought together, and the relative bearing of the different opinions of the judges examined. Had the question not been, however, so far set at rest, any doubts that might have existed could not have in many instances affected carriers by water; as in cases where the carriage of goods is regulated by a bill of lading, or other instrument, this duty is generally governed by the particular terms of the engagement. The manner of delivering the goods, and consequently the period at which the responsibility of the masters and owners will cease, will depend upon the custom of particular places, and the usage of particular individuals. Thus a hoyman who brings goods from an out port to the port of London, is not discharged by landing them at the usual wharf, but is bound to take care, and send them on by land to the place of consignment. And if the consignee require to have the goods delivered to himself, and direct the master not to land them on a wharf at London, the master must obey the request, for the wharfinger has no legal right to insist upon the goods being landed at his wharf, although the vessel be moored against it. But in the case of ships coming from a foreign country, delivering at a wharf in London discharges the master. If the consignee send a lighter to fetch the goods, the master of the ship is obliged by the custom of the river Thames to watch them in the lighter until the lighter is fully laden, and until the regular time of its departure from the ship is arrived; and he cannot discharge himself from this obligation by declaring to the lighterman that he has not hands to guard the lighter, unless the consignee consent to release him from the performance of it. In the case of ships coming from Turkey, and obliged to perform quarantine (see 6 Geo. 4. c. 78.) before their entry into the port of London, it has been usual for the consignee to send down persons at his own expense, to pack and take care of the goods; and, therefore, where a consignee had omitted to do so, and goods were damaged by being sent loose to shore it was holden that he had no right to call upon the master of the ship for a compensation. See Abbott on Shipping, 1st edit. 229. 230; Mbilloy. 212. [151]

(b) *Of collateral liabilities, vide ante, p. 130.*

(D) *OF THEIR RIGHTS AND PRIVILEGES.*

(a) *To reward. 1st. For carriage.*

The amount which a carrier by water is entitled to for the carriage of goods must be regulated by whether there is any agreement entered into between the parties or not. In the former case it is of course impossible to lay down

The amount of carriage payable, the time at which it ought to be paid, and

the parties any particular rule, as the reward payable must depend upon the risks and hazardous situations a party may be subjected to or placed in. In the latter case the remuneration must always be reasonable; upon which ground it has been holden, that the carrier may sue upon a *quantum meruit, vide ante*, p. 131. The time at which the fare is payable has been also noticed, *vide ante*, p. 133. And the parties who are liable for its payment have been pointed out, *vide ante*, p. 133.*

2dly. For warehouse room, *vide ante*, p. 134.

3dly. For Portage, *vide ante*, p. 134.

4thly For wharfage, see post, tit. Wharfinger.†

the parties who are liable for its payment depend on the existence, or non-existence of an agreement between the parties.
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* In many instances which occur in the case of carriers by land, the bill of lading becomes in this, as under other circumstances which have been noticed, evidence of a more express contract between the parties than that relation which generally subsists by the custom of the realm. Although, however, the position in which the bill of lading places those who are parties thereto will be fully examined under the subsequent titles of "Lading, Bills of, Charterparties; Freight, &c." it may not be here inexpedient briefly to notice and succinctly to state, what the nature of such contract is, and summarily to advert to the privileges and immunities it confers upon the individuals, and the liabilities and disadvantages they incur, and subject themselves to, inasmuch as the discussion of such a topic is so intimately connected with the title of the work now under examination. Beawes. 142. observes, that bills of lading not only contain an acknowledgment of the receipt of the goods, and stipulate for the delivery to the order or assigns of the shipper, but they usually state the goods to have been shipped by the persons named, in good order and well conditioned, and that they are to be delivered in like good order and condition at the place to which they are consigned, which obliges the captain to make such a delivery. Whatever the expressions and terms used in such instrument, however, are, not only is there an implied contract raised between the parties by delivery and acceptance of the goods for the due performance of all the stipulations and conditions expressed, but as the instrument is in effect not only a contract of affreightment, but a contract of bailment for a faithful discharge of all other common law obligations incident by the custom or otherwise to such an undertaking, the captain of the vessel is thereby entitled to recover against the consignee or his assignees (such bill being indorseable for good consideration, and conferring by means of such indorsement the same legal rights as the original consignee was possessed of,) the freight, demurrage, pilage, &c. or other claim which he might have according to the terms of the bill, and his freight is to be calculated by the mesures and rates therein mentioned. The peculiarity of this contract is, that unless the freight be wholly earned by a strict performance of the voyage, no freight is due or recoverable, nor can a promise to pay *pro rata* be implied, unless the goods are voluntarily accepted at such an imperfect stage of the contract; and this rule obtains, although the freight be made payable at the shipping port. The receiving of goods on board the ship is a sufficient consideration for an express promise to pay the freight immediately, but no such contract can exist without express stipulation. And when some of the bills of lading expressed that the goods were to be delivered at a foreign port, "freight for the goods being paid in London," and others, "the shippers paying freight for the goods in London," it was held not sufficient evidence of a special contract to pay freight on the shipment of the goods at London, but rather that it should be payable there after the performance of the voyage. Not even an inchoate right to freight attaches until the ship has broken ground, unless, perhaps, in the case of an embargo, which may be said to form an exception. By the marine law, if the voyage be interrupted, the parties are entitled to recover *pro rata* and by the common law of England, if the contract be dissolved or cannot be performed, a new contract arises upon a meritorious consideration for work and labour, but an embargo, which is only a temporary suspension, does not dissolve the contract. Having stated these general rules, and shown the nature of the engagement into which carriers by water often enter, without examining the minute particulars of which the subject is composed; any further remarks must be postponed until the cases which will be collected under the titles of Bills of Lading, Freight, Lien; &c. are abridged, with an exposition of what freight strictly is, how it is in general created, how the amount of it is settled, the manner and time of payment of it, when the entire freight is earned, where only part of it is earned, who are entitled to it, who are liable to pay it, how the right to it is relinquished, what the lien in respect thereof is, the nature of the action appertaining thereto, when the freight is recoverable back, and when it may be insured or pledged, will be afforded. In the meantime reference may be made to the following authorities; 6 Esp. 16. 22; 4 Taunt. 102; 1 Camp. 84. 104. 369; 4 East. 211; 2 Campb. 587; and 23 East. 399; 2 M. & S. 308; 3 Campb. 546; Peake. 188; 2 Campb. 466. 627; 2 B. & P. 321; Sty. 220; 1 B. & P. 634; 2 Burr. 881; 2 Sh. 1251; 8 T. R. 259, 4 Taunt. 138; Beawes. Lex. Merc. 87; and Dig. Lib. 19; Tit. 2. c. 61.

† The right to demand any thing for wharfage does not, of course, arise out of the character of a common carrier by water; but a reference to it has been made, as it frequent-

(b) *Of their ken, vide post, tit. Lien.*

III. OF PRIVATE CARRIERS.

1. *COGGS v. BERNARD*. T. T. 1703. K. B. 2 Lord Raym. 909; S. C. 1 Salk. 26. 3 id. 11; S. C. 1 Com. 133.

¶ The declaration in this case averred, that the defendant undertook to carry goods safely and securely, and showed a breach. It was objected, after verdict for plaintiff, on motion in arrest of judgment, that he was not responsible for any damage they had sustained, as it was not alleged he was a common carrier, or had any thing for his pains. The Court now delivered judgment in favour of the plaintiff, and Gould, J. said—I think this is a good declaration; the objection that has been made is, because there is not any consideration laid. But I think it is good either way; and that any man that undertakes to carry goods is liable to an action, be he a common carrier, or whatever he is, if through his neglect they are lost, or come to any damage, and if a premium be laid to be given, then it is without question, &c. The reason of the action is the particular trust reposed in the defendant, to which he has concurred by his assumption, and in the executing which he has miscarried by neglect.

See Cro. Jac. 262; Sid. 264; Keb. 85.

2. *HUTTON v. OSBORNE*. M. T. 1729. K. B. MS. 1 Sel. N. P. 407. n. 6th edition. S. P. NELSON v. MACINTOSH. H. T. 1816. 1 Stark. 237.

In a special action on the case, wherein the plaintiff declared that whereas the defendant had undertaken to carry a hare for the plaintiff from A. to B., yet the defendant carried the same so negligently that he lost it by the way, to the damage of the plaintiff of 10*l.* on demurrer to the declaration, it was objected by Hawkins, Serjeant, that the plaintiff had not declared on the general custom of the realm relating to carriers, and therefore the defendant must be taken to be a private person; if so, there was not any consideration laid, and, therefore, the promise was merely *nudum pactum*. 2dly, The plaintiff had not set forth a delivery of the hare, and for the breach of which promise the action was brought. Probyn and Reynolds (the only judges in court,) as to the first objection, admitted that the defendant must be taken as a private person; but, they said: it was determined in *Coggs v. Bernard* that a private person was answerable, if he undertook the carriage of goods, for a misfeasance, though there was not any consideration; and, they observed: the defendant in this case voluntarily undertook to carry the goods; he ought, therefore, to answer, in damages, for the loss arising from his negligence. As to the second objection, the Court said, that the delivery was implied, for it was stated that the defendant had carried the hare part of the way, which he could not have done without a delivery, and as for the breach of promise, the action was not brought for that, but for the loss of the hare; the promise was only inducement. Accordingly they gave judgment for the plaintiff.

3. *HODGSON v. FULLARTON*. E. T. 1813. C. P. 4 Taunt. 787.

The facts of this case are of a nature not immediately connected with the doctrine contained in the margin. It is sufficient to observe that this was an action brought against the commander of a ship of war, who had taken the bullion of a private merchant on board, for not safely keeping and delivering, which was considered sustainable.

4. *HATCHWELL v. COOKE*. E. T. 1816. C. P. 6 Taunt. 577; S. C. 2 Marsh. 293.

This was an action against the master of a store-ship, for the loss of a quantity of bullion which he had undertaken to bring from Gibraltar to this country, but which had not been delivered. The plaintiff was a merchant in this country, acting at Gibraltar by means of an agent there, who, finding this store-ship bound for England, put his property on board, receiving a bill of lading from the captain, as he would have done from the master of any vessel undertaking to carry goods for freight. It was contended, that the ship being in the service of the crown, the master was not answerable for the loss of the bullion. But the Court held, that the master was answerable, as he was a private merchant, and not a public officer. And against the master of a store-ship in the king's service, who took in the bullion of a private merchant on board, and lost it, the action was sustained. [154]

Where a person undertakes to carry goods safely and securely, [153]

He will be responsible for the damage they sustained in the carriage through his neglect, though he is not a common carrier, nor has any reward for his labour.

Thus actions have been held on to lie against the commander of a ship of war;

freight, and king's service, it was illegal in the captain to take goods on freight by statute 22 Geo. 2. c. 33. The Court held, that if the whole transaction were illegal, and the illegality were known to the plaintiff as well as to the defendant, the former could not recover against the latter for not having performed a contract which ought never to have been entered into; but observed, that if the words of the statute were attended to, it would be found that if an unlearned person were to read the clause in the act, he would suppose that the captain was authorised to take gold or silver on board; for the statute, c. 33. s. 24., by reference to the 18th article therein mentioned, enacts, that if any captain, &c. shall take on board any goods, except gold, silver, &c., he shall be liable to certain penalties. On principle, therefore, we are of opinion that this action may be sustained. In addition to which, the doctrine of Lord Chief Justice Mansfield, in *Montague v. Janverin*, 3 Taunt. 442. goes very far towards saying that a captain who takes this responsibility on himself may be called to answer it. And the case of *Hodgson v. Fullarton* (*supra*, p. 153.) goes still further, and is directly in point; for the defendant in that case also was called upon to pay the value of the goods lost; and it was never suggested, that because he violated his duty, he was not answerable to the person who had entrusted him with them.

The chief distinction which exists between these different persons appears to be, that a private person is not obliged to undertake the carriage of goods.

5 HUTTON v. OSBORNE. M. T. 1729. K. B. MSS. 1 Sel. N. P. 407. n. 6th edition.

In this case, the following distinction was pointed out between a private person who specially undertakes to carry goods; and what is generally understood by the name of a "common carrier." The only difference between these parties is, that a common carrier is obliged to undertake the carriage of goods, and a private person is not.

6. ROBINSON v. DUNFORD. E. T. 1801. C. P. 2 B. & P. 417.

And is responsible only to the extent of his contract, and not for that additional degree of liability which is required from a common carrier. This was an action against the defendant for damage done to certain goods entrusted to his care to be carried from A. to B., and which, from the evidence and finding of the jury, it appeared he had warranted to go safe. A verdict had been accordingly found for the plaintiff, with liberty to defendant to move that the verdict be set aside, and a nonsuit entered. A rule nisi for that purpose having been obtained, Heath, J. after it had been argued, said—the defendant in this case is not charged as a common carrier; he is charged on a special undertaking; and the jury have found on good grounds that he undertaking stated in the declaration was made by the defendant. They have decided, upon considering the whole transaction, that the words used by the defendant amounted to a warranty, and we cannot say they have done wrong.—*Postea* to the plaintiff.

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Both common carriers and private carriers may maintain *assumpsit* for a breach of either an express or implied contract; For the carriage of goods, They may also sue for any breach of contract, on the part of the owner, where by they

IV. OF THE REMEDIES BY AND AGAINST CARRIERS.

(A BY ACTION.

(a) *By carriers.*

1. The peculiar remedy which a common carrier has in case the carriage has not been paid at the time the goods are delivered to him, and he is entrusted with their custody, will be pointed out under the title of Lien. If he does not, however, insist upon such privilege, or has relinquished his power to detain the goods until he is remunerated, he may maintain an action of *indebitatus assumpsit*, or if a private carrier of special *assumpsit* to recover what the former is justly and reasonably, or the latter is according to the terms of his contract, entitled to demand. He may also obtain what he has expended in booking parcels, and has of course a right to sue the owner of the goods for any special breach of contract he may have incurred. Hence the master of a vessel may maintain an action against a person who has employed him to bring goods for not unloading the same in ten days after notice of the arrival, whereby plaintiff lost freight during another voyage. And it would seem that the owner of goods brought on board, which afterwards turn out to be smuggled, is liable to answer for any loss that may be occasioned by such illegal act.
2. The right of a carrier to maintain an action of trover for the loss of goods

has been previously examined, when considering the effect a delivery of goods to a carrier has upon his rights as connected with other persons, *ante*, p. 70.

3 BROWN v. HODGSON. M. T. 1812. C. P. 4 Taunt. 189.

Action for goods sold, and the money counts. Plaintiff, who was a carrier, had delivered the goods by mistake to defendant, and paid the consignee the value of them. It was objected for the defendant, that there was no contract of sale either express or arising by implication of law between the parties upon this transaction; and that although the plaintiff might have recovered in trover, he could not bring *assumpsit* for goods sold. The count for money paid was not adverted to at the trial. Verdict for plaintiff. A rule nisi had been obtained to set it aside, which was now discharged; Mansfield, C. J. observing—at this trial my attention was not called to the count for money paid; but upon this count I think this action may be sustained, as it is not the case of a man officiously paying money for another.

• money paid to their use; but they cannot recover as for goods sold and delivered to them.

(b) *Against carriers* * 1st. *Of the form of action.*

When a carrier has either on the one hand lost or injured the goods which have been delivered to him, or has on the other been guilty of a misfeasance which amounts to a conversion, he is liable in the one case to an action of *assumpsit*, or upon the case, and in the other to an action of trover. The former species of action arose, however, out of the innovations upon the common law duties of carriers, for whilst their occupation was only considered a public duty, the breach was a *tort* for which they were liable to an action on the case, founded upon the custom; but when they succeeded in establishing the existence of a contract, they became also subject to answer in an action of *assumpsit* on the express or implied undertaking.

(1) *Assumpsit.*

1. DALE v. HALL. 1 Wils. 281; S. C. MSS. Selwyn. N. P. 6th Edit. 423, n. S. P. DARLSTON v. KEARSON. T. T. 1695. K. B. Comb. 333.

This was an action of *assumpsit* brought against a common carrier of goods, for damage done to goods. Denison, J. observed, that the declaration upon the custom of the realm was the same in effect with the declaration before the Court.

2. SLEAT. v. FAGG. H. T. 1822. K. B. 5 B. & A. 342.

It appeared that defendant, a common carrier, undertook to send a packet belonging to the plaintiffs, by a coach called A., but that instead of doing so, he had forwarded it by a coach called B. The property was lost. The plaintiff accordingly commenced this action of *assumpsit*, in which, after setting out the above contract to transmit the parcel by the coach called A., it was alleged in the breach, that defendant did not forward the parcel by the above coach, but on the contrary caused the parcel to be sent by a certain other coach, whereby the parcel and contents were lost to plaintiff. Upon these facts now coming before the Court for a special purpose, which it is here irrelevant to notice (*vide ante*, p. 109,) Holroyd, J. said—the plaintiffs in this case might have declared, that they having delivered to the defendant a parcel for a particular purpose, he, by a direct misfeasance, converted it to a different purpose, and a count in trover might have been joined. We entertained some doubts in the course of the argument, whether *assumpsit* was the proper form of action, on the ground that the concealing from the defendant the value of the parcel, might be considered such a fraud on the part of the plaintiffs, as to annul the contract altogether, and then recourse must have been had to the

* It may be here observed, that the above division is entirely confined to cases where the carriers have become responsible from the liability which they incur at common law, and does not refer to or touch upon those instances where common carriers have entered into any other special agreement, whereby they may have bound themselves to the performance of duties which would not have been exacted from them, or have released themselves from what they may have considered as obligations of too weighty and important a nature to become parties to; as for instance, where bills of lading exist as evidence of the contract between the parties, or those occasions where the owners of goods have entered into special engagements with private carriers.

have been subjected to loss; And may bring trover against strangers for the loss of goods;

Or where they have paid the owner the value, sue them for [156]

The form of action to be adopted in suing common carriers of goods depends on the nature of the cause of action; and the mode of considering the injury.

If it be viewed as the non-performance of a contract, *assumpsit* is the established mode of declaring.

As where the carrier instead of conveying the parcel according to his engagement [157] it to another carrier for that purpose, where by it was lost.

In this form, the plaintiff will be, however, precluded from joining a count in trover.

And insuch remedy for the misfeasance. But upon further consideration, we are of opi-
 case he nion that the contract was not wholly rendered void by that act of the plain-
 subjects tiffs.

3. The plaintiff is bound to sue all the parties who are jointly liable when he
 brings an action of *assumpsit*, or the defendant may plead in abatement.*
 joinder of any parties jointly liable;

Or to an 4. A carrier suing in *assumpsit*, must prove at the trial a joint liability in all the
 objection, persons whom he has declared against, or advantage may be taken of that
 that he has omission under the general issue; for the contract must be proved as stated,
 not proved a joint lia and the proof of a contract with A. and B. will not support a contract stated to
 bility in all be made with A. B. and C. See 1 Esp. 182; 1 Wm. Saunders. 291, n. 4; 2
 the persons N. R. 454.

whom he 2. Case.
 has sued.† 1. Many of the disadvantages under which the plaintiff labours by bringing
 By consi an action of *assumpsit*, are avoided by adopting an action upon the case, and
 dering the some advantages are obtained, which are peculiar to an action arising *ex delicto*.
 injury, how By bringing an action upon the case a count in trover may be added,
 ever, as a where that form is applicable. The defendant will be ousted of his plea in
 breach of abatement on the ground of not joining all the parties; or of any plea of sett-
 duty, and off, or bankruptcy; and where there are several defendants, the plaintiff will
 declaring be entitled to a verdict if some are found guilty, although others are acquitted.
 in case The benefits derived from an insertion of the money counts will be, however,
 these disad lost, and the privilege of bail not so easily obtained.
 vantages may be thought the privilege of using the money counts, which it has been seen, *infra*, n. apper-
 avoided, al tains to the action of *assumpsit*, must be abandoned.

As, howe 2. POWELL V. LAYTON. M. T. 1806 C. P. 2 N. R. 365.
 ver, much To an action on the case in the form of *tort* against one of several joint own-
 diversity ers of a ship for not safely conveying goods which had been delivered to him
 has existed by the plaintiff for that purpose, the defendant pleaded in abatement that the
 in the goods were delivered to him, and his partners join'ly, and that his partners
 courts as to were not sued. Demurrer and joinder. Sir James Mansfield, C. J. in de-
 whether livering judgment, said—The question intended to be raised in this case is,
 this action whether to a declaration framed as this is, the defendant be entitled to plead
 is to be in abatement. There are two kinds of actions of *assumpsit*; one which con-
 considered fines itself to the contract only, and makes the breach of the contract the
 as arising ground of complaint, in which case the money counts may be joined; the other,
 ex contrac that which founds itself upon the carelessness and breach of duty of the de-
 tu, fendant, with which a count in trover may be joined. But in this case it does
 [158] not depend on the form of the declaration, whether this action be for a *tort* or
 on a contract, but on the nature and cause of the action. Now the substance
 of the declaration is, that he received the goods to carry for freight. It seems
 also to be admitted, nor indeed can there be any doubt upon that head, that if
 this action is founded on contract, the plea in abatement is good. The word
suscepit is certainly not used in the declaration, yet the nature of the charge is,
 that the defendant agreed to carry the goods to a particular place, and has fail-
 ed in the performance of his agreement. Can it then make any substantial dif-
 ference that the word *suscepit* is not used? If it does make no difference, the
 plea is good, and the demurrer cannot be sustained. Besides, if this action
 can be turned into an action for a *tort*, no case of contract can be mentioned
 which may not be turned into *tort*; for every nonpayment of money in pursuance
 of a contract is as much a breach of duty as a non-delivery of goods. With
 such a view of the subject, judgment must be given for the defendant. See
 12 East. 452.

Or ex de
 licto, it
 may not be

3. GOVETT V. RADNIDGE. M. T. 1802. K. B. 3 East. 69.
 In this case Lord Ellenborough seemed to consider, that an action brought

* As the cases applicable to this point will be more appropriately abridged in the next
 subdivision, it will not be here necessary to do more than merely state the law as above.

† There is, however, this advantage attending laying the action in contract, that the
 plaintiff may insert the money counts, if he has other causes of action to which they are
 applicable.

against certain carriers for the non-performance of their duties as such, might be either laid as arising *ex contractu* or *ex delicto*, and observed what inconvenience is there in suffering the party to alledge his *gravesmen* if he please, as consisting in a breach of duty arising out of an employment for hire, and to consider that breach of duty as tortious negligence, instead of considering the same circumstances as forming a breach of promise implied from the same consideration of hire. By allowing it to be considered in either way, according to the neglect of duty, or the breach of promise, is relied upon as the injury, a multiplicity of actions is avoided, and the plaintiff, according as the convenience of his case requires, frames his principal counts in such a manner, as either to join a count in trover therewith, if he have another cause of action for the consideration of the court other than the action of *assumpsit*, or to join with the *assumpsit* the common counts if he has another cause of action to which they are applicable.

4. *Boson v. Sandford*. T. T. 1686. K. B. 2 Show. 478; S. C. Skin. 278; S. C. 3 Mod. 321; S. C. Carth. 58; S. C. 3 Lev. 258; S. C. Salk. 440; S. C. 1 Show. 29. 101; S. C. 3 Salk. 203. 258; S. C. Comb. 116; S. C. 1 Freem. 409.

In an action upon the case against two of four joint owners of a vessel for a breach of duty in the carriage of goods, which the defendants had undertaken to carry for a reasonable freight, to be therefore paid, the court said, that they were of opinion, that this was not an action of *ex delicto*, but *quasi ex contractu*, and gave judgment for the defendant, because all the owners were not joined.

5. *Buddle v. Wilson*. T. T. 1795. K. B. 6 T. R. 369.

In an action against a carrier in case, on the custom of the realm, for not safely carrying goods, &c. the defendant pleaded in abatement, that his partners ought also to have been sued. General demurrer. The above case—*Boson v. Sandford* was cited, and pressed by counsel. The court said—The general rule need not be disputed, that in actions of *tort* the defendant cannot plead such a plea as the present; but that rule must be confined to cases which are (strictly speaking) actions for a *tort*, and cannot be applied to such a case as this, where the cause of action arises *ex contractu*. This action is found on the custom of the realm, and that custom is not considered part of the contract. It is admitted, that if the plaintiff had declared in *assumpsit*, the defendant might have pleaded in abatement that the other partners ought to have been joined, then the defendant must have the same right to put in the same plea to this action, for the form of the action cannot alter the nature of it, or the obligation of the parties.

6. *Govett v. Radnidge*. M. T. 1802. K. B. 3 East. 62. *S. P. Mitchell v. Tarsutt*. T. T. 1794. K. B. 5 T. R. 649. *S. P. Perry v. Hanwicks*. H. T. 1791. K. B. MSS. cited 6 T. R. 371. *Holdwin v. Ibbertson*. C. P. MSS. cited *ibid*.

In an action against three defendants, wherein the plaintiff declared that they had the loading of a certain hogshhead of treacle for a reasonable reward, to be thereupon paid to two of them, and a certain other reward to the other; and that the defendants so negligently conducted themselves that the hogshhead was lost; a verdict having been found for two of the defendants, and against the other it was insisted, upon motion in arrest of judgment, that the cause of action being founded in contract, or arising at least *quasi ex contractu*, the finding of not guilty as to two of the defendants, negatived the existence of a joint contract, which must be proved if the action were founded in contract; and that the plaintiff was not entitled to judgment upon the record. The case of *Boson v. Sandford* was principally relied upon. But the court said—in that case one question was, whether the action were maintainable against these defendants alone, certain other part owners of the ship not having been joined as defendants. Another question was, whether, if the action ought to have been brought against all, this matter ought not to have been pleaded in abatement, and not given in evidence (as it had been) on the general issue. Dolben, J. (according to the report in 3 Mod.) was the only one of the judges who was o.

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opinion that the matter could be pleaded in abatement; about the right to do which, I presume, at this time of day, nobody can entertain a doubt. Nay; since the case of *Rice and Shute*, before Lord Mansfield, in 5 Burr. 2611; and *Abbott and Smith*, 1 Blac. 947. before De Grey, C. J. nobody can entertain a doubt but that the objection was available, not only by plea in abatement, but that it was available in that way only, and cannot be taken advantage of on the general issue. Lord C. J. De Grey, in *Abbott v. Smith*, speaking of the case of *Boson v. Sandford*, says—In that case the court were divided, and those who determined the case went upon a false assumption, that this could not be pleaded in abatement. Had they been aware that it could, they declared that it could not have been given in evidence. This case, therefore, which was so much pressed upon Lord Kenyon, in *Buddle v. Wilson*, and upon which he is understood to have proceeded, has been shaken to its foundation in the main points which it assumed to determine; for the action in that case was expressly an action of *assumpsit*, in which the omission to join all the part owners is a matter pleadable in abatement, and which, in that mode only, could be taken advantage of; both which points were, however, otherwise holden in the case of *Boson v. Sandford*. This case may therefore be laid out of the question as an authority for some of the propositions therein determined. We are of opinion, that the acquittal of one defendant in an action founded, as this is, on neglect of duty, and not upon breach of promise, does not affect the right of the plaintiff to have his judgment as against the defendant, against whom the verdict has been obtained, and that the rule for arresting the judgment ought to be discharged.

But altho' it was then and has been since in direct terms up held in the case of *Powell v. Layton*.

7. *POWELL v. LAYTON* M. T. 1836. C. P. 2 N. R. 365.

In this case Sir James Mansfield, C. J. made the following observations with reference to the case of *Boson v. Sandford*—This case is reported by various authors, none of whom throw out the slightest doubt respecting the propriety of the decision. It is confirmed by Lord Chief Baron Comyn, in his Digest; tit. Abatement; (F. s.) Joint Contractors; and again in the same Digest; under title, Action upon the Case for negligence C.) So in *Danver's Abridgement*, p. 8 under title Action; so in *Dale v. Hall*, 1 Wils. 281; and in *Mitchell v. Tarbutt ante*, p. 159; the court of K. B. seemed to consider it law, though distinguishable from the case then in judgment, which was clearly a case of *tort*. Then followed the case of *Buddle v. Wilson* (*ante*, p. 159.) which in direct terms, upheld the case of *Boson v. Sandford*. The decision of *Govett v. Radridge* (*ante*, p. 159.) may be, however, said to militate against the doctrine we are establishing. But that case lies open to some observations; in that decision some stress is laid on the circumstance that three of the judges were mistaken in supposing that the joint contract could not be pleaded in abatement; but it must be remembered, that until the case of *Rice v. Shute* (5 Burr. 2611.) such a plea was not used. It is true that Lord Chief Justice De Grey, in *Abbott v. Smith* (2 Bl. 947.) says, that the rule laid down in *Rice v. Shute*, is not novel, and refers to some cases which are to be found in Comyn's Abridgement, tit. Abatement, (E. 12.) Joint Contractors. But these are cases of debt on simple contract, which was the usual mode of declaring previous to *Slade's case*; Say. 46. It can hardly be said, therefore, that the judges, in *Boson v. Sandford*, were mistaken, who thought as all judges before them had thought and as all judges continued to think, till the case of *Rice v. Shute*, *Boson v. Sandford* must, consequently, be considered an existing authority, to show, that to an action on the case, in the form of *tort*, against one of several joint owners of a ship for not safely conveying goods which had been delivered to him by the plaintiff for that purpose, the defendant may plead in abatement that the goods were delivered to him and his partners jointly, and that his partners were not sued.

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8. *MAX v. ROBERTS*. E. T. 1807. C. P. 2 N. R. 454; S. C. 12 East. 89.

And even in a still later case. This was an action brought against nine defendants, joint owners of a vessel, on board of which goods had been delivered, consigned to the plaintiff. The declaration alleged a delivery of the goods to be carried for freight, and

a breach of duty in making a deviation during the course of the voyage, by which the plaintiff lost the benefit of a policy of insurance. It appeared in evidence, by the ship's register, that only eight of the defendants were owners, and that one of them had afterwards married the ninth. A verdict having been found for the plaintiff, the Court made a rule absolute for entering a nonsuit, upon the ground that the action was founded in contract, and that the plaintiff was not entitled to recover, because he had not proved all the defendants to be liable. A writ of error was brought, which was twice argued; once in the Court of King's Bench, and then afterwards in the Exchequer Chamber, (*vide* 12 East. 89.) it having been adjourned there, as it was supposed that a decision in this case might settle and put at rest the question upon which the contrary judgments, in the cases of *Powell v. Layton*, *ante*, p. 160; and *Govett v. Radnidge*, *ante*, p. 159. had been given; but, after argument, the twelve judges were unanimously of opinion that the declaration was so defective in several material respects, perfectly collateral to the question upon which the determination of the judges was sought, that the judgment of the court below must be affirmed.

Not only may its authority be said to be weakened impliedly, by a refutation of those cases in which it had been previously recognised;

9. *GOVETT V. RADNIDGE*. M. T. 1802. K. B. 3 East. 69.

The Court, in animadverting upon the propriety of the decision of the case of *Buddle v. Wilson* (*ante*, p. 159.), observed, that the case of *Dickon v. Clifton* (*infra*) had never been cited or brought before the consideration of the Court during the argument.

1. *DICKON V. CLIFTON*. M. T. 1766. C. P. 2. Wilson 319.

Case against a carrier for negligently carrying malt. Per Wilmot, C. J. It is objected, that the first count is laid *ex quasi contractu*, and cannot be joined with trover; supposing it was so, yet I should lay no great stress upon old cases to this point at this day; but I think the first count is laid to be *ex delicto* of the defendant, and as a misfeasance which may undoubtedly be joined with trover. The true test whether counts may be joined, is to consider whether there be the same judgment in both. I own that in many books it is reported, that trover and a count against a common carrier cannot be joined; but common experience and practice is now to the contrary. This is laid as a misfeasance, wherein there is the same judgment as in trover, and therefore the plaintiff must have judgment.

But the doctrine contained in it as applicable to the point now under consideration, may be even said to be no longer tenable from a consideration both of ancient,

11. *BRETHERTON V. WOOD*. T. T. 1821. Ex. Ch. 3 B. & B. 54; S. C. 6 Moore. 141; S. C. 9 Price. 408.

In an action on the case in the King's Bench against ten defendants, the plaintiff's declared, that before and at the time of the grievance complained of, they were proprietors of a stage coach, for the conveyance of passengers for hire from A. to B., and that being so, they received the plaintiff as an outside passenger, to be safely conveyed thereon from A. to B. for hire to them in that behalf; and that by reason thereof they ought to have safely conveyed him accordingly, and assigned for breach, that they conducted themselves so carelessly in this behalf, that by and through the carelessness, unskilfulness, and default of themselves and their servants, the coach was upset, by means whereof the plaintiff was hurt, and sustained other injuries. A jury having found a verdict against eight of the defendants only, and in favour of the other two, and judgment being entered accordingly, the Court held, that as the action was founded upon a breach of duty imposed by the custom of the realm, which was a breach of the law, and as the declaration was framed on a misfeasance, such verdict and judgment were not erroneous, and they were therefore now affirmed in the Exchequer Chamber in error, although it was contended, that the cause of action being founded substantially upon a contract, was subject to all the incidents of an action upon a contract, and that, consequently, the plaintiff was bound to prove a joint liability in all the defendants, upon the authority of the decisions in *Powell v. Layton*, 2 N. R. 365. *ante*, p. 165; *Max v. Roberts*, *ante*, p. 166; *Green v. Greenback*, 2 Marsh. 485; *Boson v. Sandford*, *ante*, p. 158; and *Dale v. Hall*, 1 Wils. 281. *ante*, p. 156. Chief Justice Dallas, in the delivery of the judgment, observing—If it were true that the

[162]
And modern authorities;

present action was founded on contract, and so much so, that in order to support it, a contract between the parties must have been proved, the objections would deserve consideration: but we are of opinion, that this action is not so founded, and that on the trial it was not necessary to show that there was any existing contract: and, therefore, that the obligation entirely fails. This was, in fact, an action on the case against a common carrier, upon whom a duty is imposed by the custom of the realm; in other words by the common law; to carry and convey goods or passengers safely and securely; and so that, by their negligence or default, no injury or damage happen. A breach of this duty is a breach of the law; and for this breach an action lies, founded on the common law, and such action wants not the aid of a contract to support it. In that view of the subject the authorities principally relied on by the plaintiffs in error have no application. Those were chiefly the cases of *Powell v. Layton*, 2 N. R. 365; and *Max v. Roberts*, 2 N. R. 454. These cases are decided by the same judges, and are in no respect like the case now before us. Each of them were actions against owners of a ship not stated to be general ships

[163] carrying the goods of all who chose to send them, but it is stated as a particular employment in each case. In the first of those cases, *Powell v. Layton* the declaration stated, that the plaintiff, at the special instance and request of the defendant, had caused divers goods, &c. to be delivered to him, to be carried and conveyed by him on board of a certain ship or vessel of the defendant: then in the river, and bound for parts beyond the seas. Now, it is obvious, from the declaration, that that was a case founded on a particular contract; and therefore the Court held, that the defendant's plea in abatement; that the goods were delivered to the defendant and another person, they being partners and jointly interested in the vessel, was good; and that the other person ought to have been joined. Consequently, on demurrer to that plea, judgment was given for defendant. In *Max v. Roberts*, the point in the cause was decided on the same principle, although the question arose in a different shape. There the declaration stated, that the defendants were owners of a ship, and that the goods were shipped on account of the plaintiff, to be carried &c. On the trial he failed in proving that the defendant Roberts, and eight other defendants, were part owners; by his evidence he affected the eight only. The same judges who decided *Powell v. Layton*, held, that the owners had no duty imposed on them but what arose by contract, and adhered to their former decision in that case. Here, however, a duty was imposed on the defendants which did not arise by contract, but by the common law, or custom of the realm. It is not material, therefore, to oppose the decision in the case of *Powell v. Layton* and *Max v. Roberts* to the decision of the court of K. B. or the earlier case of *Govett v. Radnidge*, because this case differs from them. If those cases should, on any future occasion, be brought into opposition with each other, it must remain to be decided which of them is right if they differ, and are irreconcilable. At present it is sufficient to say, this action is founded on a misfeasance, and that the declaration is framed accordingly; and, therefore, that the verdict and judgment given against some only of the defendants, is not erroneous, and ought to be affirmed.

In both
courts.

12. *ANSELL v. WATERHOUSE*. T. T. 1817. K. B. 2 Chit. Rep. 1 *WEALL v. KING*. T. T. 1810. K. B. 12 East. 452.

This was an action on the case against a common carrier, for not safely carrying a passenger. Defendant pleaded in abatement the non-joinder of a co-proprietor. Demurrer and joinder. The cases of *Buddle v. Wilson*, ante, p. 159, and *Powell v. Layton*, ante, p. 161, were cited for defendant. But the court said, declarations against carriers in *torit*, are as old as the law, and continued till *Dale v. Hall*, when the practice of declaring in *assumpsit* succeeded; but this practice does not supersede the other. Here there is no need of contract; there is nothing to show that it was not a declaration on the custom of the realm. In substance, defendant is stated to be a common carrier. *Powell v. Layton* was the case of a ship owner, there were express words of a contract, and an exception as to the perils of the sea. This was only declaring

as usual 400 years before Dale v. Hall. There is a breach of duty on which, [161] as well as defendant's public character, the declaration is framed. This being an action for a *tort*, all its consequences follow, and the plaintiff might sue some only. The declaration charges carelessness and negligence, by which the coach was overturned. The plea says, that all the parties were guilty of the carelessness and negligence. There was no such plea before Buddle v. Wilson, ante, p. 59. which was a case of non-feasance, and the court overruled the plea on another point. Govett v. Radnidge, ante p. 150. would be the case to follow, if necessary to decide between conflicting cases. The case of Powell v. Layton, and other cases against ship-owners, are distinguishable.

(3) *Trover*.

1. DICKON v. CLIFTON. M. T. 1766. C. P. 2 Wils. 319; S. C. 1 Vent. 223. *Contra*, DALSTON v. JANSON. T. T. 1695. K. B. 5 Mod. Rep. 91. S. C. 12 id. 73; S. C. 1 Lord Raym. 58; S. C. 3 id. 115; S. C. 1 Salk. 10; 3 id. 204; S. C. Comb. 373.

This was an action framed against a common carrier in case, for a breach of duty, for negligence and misfeasance, with which a count in *trover* was joined. An objection was made upon motion in arrest of judgment, that these counts could not be joined; but was overruled by the court. Lord Chief Justice Willes observed—I own that in many books it is reported that *trover* and a count against a common carrier cannot be joined, but common experience and practice are now to the contrary. See 1 Vent. 365; 3 Lev. 99; 1 T. R. 276; 3 Wils. 348, W. Bl. 848.

2. GOVETT v. RADNIDGE. M. T. 1802. K. B. 3 East. 69.

In this case, Lord Ellenborough, C. J. alluding in terms of approbation to the above case, and recognizing the point that *trover* and a count against a common carrier might be joined; added, that if the count against a common carrier were laid, not in terms of contract, but upon a breach of duty, it was then the daily, and the convenient, and well warranted practice to join them.

3. RICHARDSON v. ATKINSON. M. T. 1723. K. B. 1 Str. 576. S. P. TAYLOR v. ———. T. T. 1702. K. B. 2 Lord Raym. 792.

In this case Eyre and Fortescue, Js. held, that a carrier's drawing out part of a vessel, and filling it up with water, was a conversion of all the liquor, and the jury gave damages for the whole. See Cro. Eliz. 219.

4. SYEDS v. HAY. E. T. 1791. K. B. 4 T. E. 260. S. P. SAMUEL v. DARCH. H. T. 1817. K. B. 2 Stark. N. P. C. 60.

The owner of goods on board a vessel, directed the captain not to land them on the wharf against which the vessel was moored, which he promised not to do, but afterwards delivered them to the wharfinger for the owner's use, under an idea that the wharfinger had a lien upon them for the wharfage fees, because the vessel was unloaded against the wharf. The court held that the owner, upon demand and refusal, might maintain *trover* against the captain, unless he could establish the wharfinger's right; for putting the goods in the custody of the wharfinger, brought a charge upon the plaintiff, and was, therefore a conversion by the defendant. See 1 Bl. Rep. 413. 423; 1 Wils. 328; 1 Burr. 20.

5. SEVERIN v. KEPPELL. E. T. 1802. N. P. 4 Esp. 156.

Action of *trover* against the defendant for several articles of plate given him to repair. When applied to for the goods, he excused the non-delivery, stating that he had not received some parts from the tradesman to whom they had been entrusted. There was no evidence of a refusal to deliver; but in one instance the defendant acknowledged that they were in his possession, but evaded the delivery on the ground that he was prevented by the absence of his wife; he afterwards sent home part, and stated that he had delivered the remainder. It was contended for the defendant that there was no evidence of a conversion sufficient to support the form of action adopted. Lord Ellenborough concurred, observing, that the Court usually acted on the principle, that a breach of what commences in contract could never enure as a conversion sufficient to support *trover*; and he instanced a case in the K. B. where it

When the action is laid *ex delicto*,

And not in terms of contract, a count in *trover* may be of course joined.

To sustain this count a conversion must consequently be proved, as, for instance that the carrier drew out part of a vessel and filled it up with water; Or that he put the goods into the hands of a third person contrary to orders;

As it has been held on, that for a bare non-delivery the action will not lie;

And that even a carrier's assertion that he has delivered goods to the consignee, which is false, is no evidence of a conversion. **7. YOUL V. HARBOTTLE.** E. T. 1790. N. P. K. B. Peake. 69. Cited in **DREVER V. BARCLAY.** T. T. 1819. K. B. 2 B. & A. 704.

6. ATTERSOL V. BRIANT. T. T. 1808. N. P. 1 Campb. 409. Trover against a common carrier. The defendant received a quantity of bricks to be carried to one A.; who never received them; but the defendant asserted to the plaintiff that he had delivered them to A. It was decided, that although the omission to deliver the goods was a tortious act in the defendant, the particular *tort* relied on was not supported by the facts.—Plaintiff nonsuited.

7. YOUL V. HARBOTTLE. E. T. 1790. N. P. K. B. Peake. 69. Cited in **DREVER V. BARCLAY.** T. T. 1819. K. B. 2 B. & A. 704.

It is, however sufficient, although the act constituting the intention has been unpremeditated, as if he has delivered the goods by mistake to a stranger; [166] Although under a forged order. Trover for goods, which defendant, master of a Gravesend packet-boat, had delivered under mistake to a stranger. It was contended that the plaintiff must be nonsuited, as there was no evidence of a conversion. The counsel for the plaintiff relied on the case of **Syeds v. Hay**, 4 T. R. 260. Lord Kenyon said: that case is determined on its own particular grounds; I agree that where a carrier loses goods by accident, trover will not lie against him; but where he delivers them to a third person, and is an actor, though under a mistake, this species of action may be maintained.—Verdict for plaintiff. See **Burr.** 2827; **Holt.** N. P. C. 273.

8. LUBBOCK V. INGLIS. M. T. 1815. N. P. 1 Stark. 104. The plaintiffs having received a letter from their brokers intimating that they had sold certain hides lying in the London Dock Company, belonging to the plaintiff, to one B., sent an order to the company to deliver them to the order of B. The plaintiffs accidentally discovering that the sale had not taken place, directed the company not to deliver the goods; the latter had, however, already delivered them under an order, purporting to be the order of B., but which eventually proved to have been forged. In an action against the company for the value of the goods, the defendant's counsel endeavoured to shelter themselves under the authority of B's supposed order—but Lord Ellenborough held, that the order being a nullity, the defendants had delivered the goods without authority, and were, therefore, liable for them to the plaintiffs.—Verdict for plaintiffs.

ATTERSOL V. BRIANT. T. T. 1808. N. P. K. B. 1 Campb. 410. Trover for goods. It appeared that the plaintiff had sent goods, by the defendant, a common carrier, to be delivered to C. It was proved that defendant had asserted he had delivered the goods to C.; whereas, in truth, C. had never received them; which, it was urged, was sufficient evidence of a conversion to support the action. But Lord Ellenborough was of a contrary opinion.—Plaintiff nonsuited.

10. ANON. T. T. 1704. At Nisi Prius, at Guildhall. K. B. 2 Salk. 655. S. P. **DEWEL V. MOXON.** M. T. 1809. C. P. 1 Taunt. 391. S. P. **ANON.** N. P. K. B. 4 Esp. 157; B. N. P. 45.

Per Cur. Trover lies not against a carrier for negligence, as for losing a box. A conversion must be clearly proved. But a denial is no evidence of a conversion, if the thing appears to have been really lost by negligence; but if that does not appear, or if the carrier had it in his custody when he refused to deliver it, it is good evidence of a conversion.—See 10 Co. 96; 1 Cro. 262; Lev. 173; 2 Mod. 244. 3 Mod. 2; 1 Mod. 211; 5 id. 426; 2 Show. 148. **175. 213.**

11. SKINNER V. UPshaw. H. T. 1702. K. B. 2 Lord Raym. 752. S. P. **YORKE V. GREENAUGH.** id. 866.

Trover against a carrier for detaining goods; but it being in evidence that the defendant offered to deliver the goods on payment of his hire, it was ruled per Holt, C. J. that the carrier may retain the goods for his hire.—Verdict for defendant accordingly. See 3 B. & P. 42.

12. GREEN V. DUNN. M. T. 1811. N. P. K. B. 3 Campb. 215. n. **SOLOMON V. DAWES.** H. T. 1794. C. P. 1 Esp. 83. **ISAAC V. CLARKE,** 2 Bulst. 312.

Per Lord Ellenborough, C. J. If a person who has the care or carriage of

goods, on application for them being made, refuses to deliver them, unless the person applying will satisfy him as to his property in them, this is such a qualification as destroys the fact of conversion. Or that he was not [167]

13 *AWM v. LEWYN*. 1 Vent. 223. *S. P. ANON.* T. T. 1703. K. B. 2 sure if the party applying for them was the true owner; *Salk. 655.* *ROSS v. JOHNSON.* H. T. 1772. K. B. 5 Burr. 2825; *S. C.* *B. N. P. 44 & 45.* *YOULE v. HARBOTTLE.* E. T. 1791. N. P. K. B. *Peake 50.* *OLIVE v. LAWES.* 2 Stark. N. P. C. 181. *KIRKMAN v. HARBOTTLE.* Lanc. Sum. Ass. 1800. Cor. Graham; B. cited in *Selwin. N. P. tit. Carriers.*

In this case the Court held, that if a carrier loseth goods committed to him, a general action of trover could not be supported against him; and observed: in order to maintain trover, there must be an injurious conversion. This is not, however, to be esteemed a refusal to detain the goods. The defendant cannot detain them. It is not in his power to do it. It is a base omission. The clear remedy is by action upon the case. See 6 East. 450; 2 B. & P. 439; 6 Mod. 212; 3 B. & A. 687; 3 B. & B. 2; 1 D. & R. 234. Or that they had been delivered to the consignee's servant, by whose negligence the master had been prevented from receiving them.

14. *TAYLOR v. ———.* N. P. K. B. 2 Ld. Raym. 792.

Per Cur. If goods be delivered to a carrier, and he does not deliver them according to the direction given him, upon demand, and refusal, trover lies against him upon the custom. But if the goods be delivered to a servant of the carrier, or to his warehouse-keeper, and they are not delivered, &c., an action of trover does not lie against him without an actual conversion by him.

15. *BOARDMAN v. SILL.* M. T. 1809. K. B. 1 Campb. 410. n.

In an action of trover for brandy lying in the defendant's cellar, it appeared that the defendant had refused to deliver the brandy, stating that it was his property. It was urged in support of this assertion, that the defendant had a lien on the brandy for rent in respect of the brandy, and of which no tender had been made. *Sed Per Cur.* The brandy was not originally detained on the ground of lien, nor has any demand for rent been made.—Verdict for plaintiff.

the trial is not relied upon, will be the conversion complete, although he may afterwards set up a defence to the action, unconnected with such alleged privilege.

2d. Parties to the suit.

1. Plaintiffs.

1. It being a general rule of law that such parties only can maintain an action in whom the legal interest is vested; and as we have seen that the property by delivery to the carrier, becomes absolutely vested in the consignee, it follows that the action can in general be brought only in his name. The only case in which the consignor can appear as plaintiff is where that right reserved to him under any special contract with the carrier, or where it is brought in prosecution of the right which he has by law of resuming the property whilst in transitu. In neither case will the carrier be allowed to question his title to the goods; see ante, div. Effect of Delivery.

2. *DUFF v. BUDD.* H. T. 1822. C. P. 3 B. & B. 177.

A counterfeited order for the transmittance of goods had been given to a tradesman, who in consequence delivered the goods to the carrier, directed to the supposed consignee, which were afterwards lost by the carrier by means of a negligent misdelivery. The consignees brought an action against the carrier for negligence, which the Court held maintainable, observing, In this case the consignee may sue in his own name, since the delivery of the goods to the carrier created no change of property, for there was no sale between the parties which could have transferred it to the consignee, and the delivery being by fraud, could operate no such effect. See 2 B. & A. 356.

2. Defendants.

1. *WILLIAMS v. CRUNSTON.* E. T. 1817. N. P. K. B. 2 Stark. 82. *MIDDLETON v. FOWLER.* M. T. 1699. K. B. 1 Salk. 282. *LEVI v. WATERHOUSE.* H. T. 1815. Ex. 1 Price. 280.

Action on the case against defendant as a carrier, for loss of a watch. From the evidence brought forward, it appeared that defendant was the driver of a

Whether the loss or damage arises from the negligence of the carrier or his

servants,
the action
should be
brought
against the
carrier.*

coach; that he had conveyed other parcels for the plaintiff; but it was not proved that upon the delivery of this or of any other parcel, any contract or stipulation had been made for any reward to be paid for the conveyance. It was urged that defendant was not responsible, the master being the only party who could be made to answer for the negligent carriage of the property. But Lord Ellenborough said, that if the defendant could be considered as having taken the watch to be carried on his own account, for a reward to be paid to him, he would be liable, although he acted in fraud of his master.—There is, however, nothing to indicate that the defendant received the parcel otherwise than in the character of a servant.—Plaintiff nonsuited. Vide ante, p. 130.

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2. It having been determined that the action against a common carrier for the loss of goods may be founded either in tort, or contract. ante, p. 157. the rule as to joining parties as defendants will follow the general principles of those actions. Hence if the action be not maintainable without reference to a contract between the parties and laying a previous ground for it, by showing such contract, then, although the plaintiff shapes his case in tort, the defendants may take advantage of nonjoinder of all the parties by a plea in abatement; and the plaintiff will be liable to a nonsuit if he join too many, for he shall not by adopting a particular form of action alter the defendant's situation. But when the principal count has been framed upon an alleged neglect of duty; or not upon any terms of contract, it is usual to add a count in trover if there is any ground to support it; and in such case no advantage can be taken of the omission of some defendants, or of the joinder of too many. See 8 T. R. 186.

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3d. Of the pleadings.†

1. Of the declaration.

(a 1) *In assumpsit.*

1. DALE v. HALL. M. T. 1750. K. B. 1 Wils. 282.

This was an action upon the case, against a shipmaster or keelman, who carried goods for hire from port to port. The plaintiff did not declare against him as a common carrier, upon the custom of the realm; but the declaration was, that the defendant, at the special instance of the plaintiff, undertook to carry certain goods, consisting of knives and other hardware, safe, from such a port to such a port; and that in consideration thereof, the plaintiff undertook and promised to pay him so much money: that the goods were delivered to the defendant on board his keel, and that the goods were kept so negligently by him, that they were spoiled, to the plaintiff's damage. The jury found a verdict for plaintiff, and no tenable objection was made to the declaration.

2. MAX v. ROBERTS. H. T. 1810. K. B. 12 East. 89.

The declaration in this case stated, that the defendants, being owners of a ship at L. bound on a voyage from thence to W.; the plaintiff shipped goods on board to be carried upon the said voyage by the defendants, and to be delivered at W. to the plaintiff's assigns, with other averments immaterial to the point, now abridged; which was, whether enough had been above alleged to enable the plaintiff to charge defendants with a loss of the property entrusted to them. The Court said—the declaration alleges a shipment by the plaintiff of goods on board a vessel, of which the defendants are stated to be owners; but it does not proceed to state that such goods were delivered to, or received by the defendants; or that the defendants in any manner ever had notice of the fact of such shipment; so that there is not only a want of any words importing a promise by the one party to the other; but there is also an entire absence of all circumstances or facts from which any promise or agreement could be

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* At Bury assizes, 1732, in the case of Harvey v. Syllard and his wife, which was an action for a box with 80*l.* in it, which was delivered to her as book-keeper for her brother, who was a carrier, in order to be sent by the waggon to London, which 80*l.* was afterwards lost; it was adjudged that the action would not lie against her, but it ought to have been brought against the brother himself, and the plaintiff was nonsuited; 2 Barnard. 234.

† For practical forms, see Peterdorff's Index to Precedents in Civil and Criminal Proceedings, tit. Carriers.

implied, or duly inferred between them in respect to such goods. The declaration on these grounds cannot be supported.

3. *ROSKELL v. WATERHOUSE*. H. T. 1819. N. P. K. B. 2 Starkie. 461.

Action against a carrier for not taking care of, and safely carrying goods according to his promise. It appeared that he had limited his responsibility as a carrier by means of a notice, of which the plaintiff was cognizant; the plaintiff declared against the defendant, as a carrier, in the usual form, and attempted to insist that the notice did not apply, as the goods were lost from the defendant's warehouse before the actual carriage of the goods commenced. But Abbott, C. J. was of opinion, that at all events the plaintiff could not, as his declaration was framed, insist upon this ground, since he ought to have charged the defendant as a warehouseman, and not as a carrier, or to have charged him with receiving the goods to be taken to a particular coach in order to be carried; but here the plaintiff had merely charged him with negligence as a carrier.—Plaintiff nonsuited.

4. *SAMUEL v. DARCH*. H. T. K. B. 2 Stark. N. P. C. 60.

This was an action brought against defendants, as a carrier, for the non-delivery of goods. The declaration alleged the delivery of said goods to defendant, and the undertaking to deliver the same. The delivery was proved from carrier's receipt, which also engaged to deliver said goods to bearer of the said receipt. The goods were delivered to a wrong person; counsel for defendant argued, that this special contract was not as alleged in the declaration, but to bearer of said receipt. It should have alleged that plaintiff was the bearer of receipt, or defendant refused to deliver goods to the bearer. It was on the other hand argued, that the contract was to deliver according to appointment, and the receipt was only evidence of it. Per Lord Ellenborough. It was not an unqualified contract. The defendant had a right to stipulate for the evidence of the receipt. If the declaration had been in trover, the plaintiff would have had a right to recover for a delivery of the goods to another, as it would have amounted to a conversion.

5. *LATHAM v. RUTLEY*. T. T. 1823. K. B. 2 B. & C. 20; S. C. 3 D. & R 211.

Declaration in *assumpsit* in the usual way, on the common law liability of the defendants, being carriers between Dover and London, for not safely carrying from the latter to the former place, a parcel, in which were contained a quantity of bank notes. Plea, general issue. At the trial it appeared, that the plaintiffs were bankers residing at Dover; that the defendants were accustomed to carry parcels for them for the annual sum of 52l. 10s. that on receiving of a parcel, the defendants were accustomed to give an acknowledgement to Messrs. Hoare & Co. the town bankers of the plaintiffs, that it had come to their hands, and that they would safely deliver it "fire and robbery excepted." It further appeared, that a parcel containing 900l. in bank notes, had been received by the defendants to carry to Dover, which they had not delivered to the plaintiffs; that no circumstances respecting the manner in which the parcel was lost, were known. It was objected on the part of the defendants, that there was a variance between the evidence and the declaration, for that the declaration was general, but the contract to carry was special, with an exception. The learned judge refused to direct a nonsuit; and the jury found that the notes in question had been received by the defendants, and not delivered over to the plaintiffs, and that they were received under a special contract, in which loss "by fire and robbery were excepted," but that the loss did not happen by fire or robbery, but in consequence of the negligence of the defendants, and gave the plaintiffs damages 900l.

Cause was shown against a rule to enter a nonsuit, and it was contended there was not a variance; that the jury having declared that the loss had not happened either from fire or robbery, had, in fact, found such sufficient evidence to support the declaration. It was also urged that the part about "fire and robbery" was a proviso, not an exception, and that it ought to have been set out in a plea. Per Cur. How much soever inclined we may feel to get over this objection, and to give the plaintiffs the benefit of this verdict, we find

Between the declaration and the evidence produced will be fatal. If the carrier there fore except his liability from loss occasioned by fire or robbery, &c.

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ourselves bound down by strict legal principles, to hold that there is a fatal variance between the evidence and the declaration. The plaintiffs have declared on the common law liability of the defendants to carry the parcel safely; and by that law they would not be exempted from a loss occasioned by fire or robbery. How can we say that the defendants understood the contract otherwise than as the jury have found it was made, guarding against a loss from certain circumstances? It has been said, that it was a proviso, not an exception. It is difficult to draw the distinction between those words; but here the clause was certainly an exception, and made a part and parcel of the contract; and then the case of *Browne v. Knell*, 2 B. & P. 395; S. C. 5 B. Moore. 164; applies, in which it was held to be fatal to state a covenant with an exception, as a general covenant. If this had been an exception which the law implied, it would have been far different. Put even if it be considered as a proviso, which leaves the contract untouched, still it states how the effect of it was to have been judged of, and it limits its extent in the same manner as if it had given liquidated damages. Rule absolute to enter a nonsuit. See 6 East. 569; 4 B. & A. 337; 8 East 7.

Or give a notice that he will not pay any thing for loss of goods which exceeds 5*l.* in value, the exceptions must be set out in the declaration.

[172] But if the notice be that he will not pay more than 5*l.* for the loss of any such goods, such exception need not be noticed.

6. LATHAM V. RUTLEY. T. T. 1823. K. R. 3 D. & R. 213. S. P. CLAY V. WILLAN. M. T. 1789. C. P. 1 H. Bl. 298.

Per. Abbott, C. J. Although it has been holden, that if the carrier's notice is, that he will not pay more than 5*l.* upon any goods, it limits the amount of liability only, and need not be set out in the declaration; yet it is clear, that if it is that he will not pay any thing upon goods which exceed 5*l.* in value, it there limits the liability altogether, and is such a special exception as must be set out.

7. CLARKE V. GRAY. T. T. 1805. K. B. 6 East, 563. S. P. SMITH V. HORNE. H. T. 1818. C. P. 8 Taunt. 144.

This was an action of *assumpsit* in the usual form against defendant, as a carrier, for the loss of goods above 5*l.* value, by negligence. Part of this contract proved by a general notice fixed up in the carrier's office, and presumed to be known and assented to by the plaintiffs, was, that the carrier would not be accountable for more than 5*l.* for goods, unless entered as such and paid for accordingly. The property in question was not, in fact, paid for accordingly. A verdict for 5*l.* had been recorded, subject to the opinion of the Court upon the propriety of the mode in which the plaintiff had declared. On the part of plaintiff it was insisted, that the provision that no more than 5*l.* should be accounted for, unless the goods were entered and paid for accordingly, amounted only to a limitation of the damages to be recovered in the event of a trial, of the contract of carriage, and not to a qualification of the contract itself. On the part of the defendant it was urged, that the provision in question was a limitation of the promise itself, and varied the responsibility for the entire value of the goods, which the custom of the realm, or the general undertaking to carry safely stated in the declaration, would otherwise cast upon the carriers; and that it was not to be considered as a distinct independent proviso, but as a term and qualification annexed to, and making a part of, the original contract of carriage itself. The Court considered that the declaration was correctly drawn, and observed—it seems to us to be sufficient to state in the declaration so much of any contract, consisting of several distinct parts, and collateral provisions, as contains the entire consideration for the act, and the entire act which is to be done in virtue of such consideration, and that the rest of the contract which only respects the liquidation of damages, after a right to them has accrued by a breach of the contract (such as the notice in this case), is matter to be left to the jury in reduction of damages, but not necessary to be shown to the Court in the first instance, on the face of the record.

The terms of the journey must also be accurately stated.

8. TUCKER V. CRACKLING. T. 1818. N. P. K. B. 2 Starkie. 385. LOVETT V. HOBBS. T. T. 1679. K. B. 2 Show. 129.

The contract, which was declared upon in this case, was represented in the declaration to be for the conveyance of goods from W. in the county of Middlesex, to T. in Essex, when in fact it was from Algate, in the city of London,

to that place. The question which was now argued was, whether there was a fatal variance between the averment in the declaration and the proof. Abbott, J. was of opinion, that the variance was fatal; and the plaintiff was nonsuited. See 2 East. 497; 4 T. R. 361.

An exact description of the goods is not material;

9. It is a clear and settled rule in an action of *assumpsit* against a carrier, that it is unnecessary to adhere scrupulously to an exact and minute description of the property which is the subject of the suit. See 2 Saund. 74. a.

10. It would seem that a declaration in an action of *assumpsit* against a carrier alleging that the defendant undertook, &c. for a reward, without stating the price for which he agreed to carry, could not be objected to. See 13 East. 114. n. a.; 2 N. R. 458; 3 Lord Raym. 115.

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And it is sufficient to aver that the defendant undertook

in consideration of plaintiff's request, and a certain reward to him, to carry, &c. without stating what reward.

11. *MAYOR V. HUMPHRIES.* E. T. 1824. N. P. 1 C. & P. N. P. C. 251.

The declaration, after stating the defendants' contract to carry, &c. averred that "the servants of the defendants so negligently and unskilfully drove, conducted, and managed, the said coach," that, &c. Plea, that the coach was overturned on account of the linch-pin coming out, and one of the wheels falling in consequence. It was contended, that the plaintiff could not recover under the averment in the present declaration. Little Dale, J. concurred in the defendants' objection, observing, that the words of the declaration could not be extended to apply to the sufficiency of the coach; the connexion of the words "conducted and managed" with the word "drove," being sufficient to show that the plaintiff intended to apply them in the same sense as the first conveyed.

The breach in the declaration must be shown with precision.

An allegation that the defendant so carelessly and negligently conducted himself that by means thereof the goods were lost, is of such a nature as to admit of proof of gross negligence.*

12. *SMITH V. HORNE.* H. T. 1818. C. P. 2 Moore. 18; S. C. 3 Taunt. 144.

It was maintained in this case, that a declaration in *assumpsit*, stating that goods had been delivered to the defendants, as carriers, to be conveyed by them for a reasonable reward; and that they undertook to carry them safely and securely, and deliver them accordingly; and alleging for breach that they had lost the same was not sufficient to admit proof that they had been guilty of gross negligence. But the Court held that the argument was without foundation; and that, therefore, a verdict which, it appeared, had been recorded for the plaintiff, must be supported.

(b 1) *In Case.*

1. *NUTHEWS V. HOPKINS.* E. T. 1665. K. B. 1 Sid. 245; Hardw. 485-6.

S. P. CARTER V. DOWNICH. T. T. 1688. K. B. 3 Mod. 227; S. C. Carth. 83; S. C. 1 Show. 127.

In an action on the case, it was formerly usual to set out the custom of the realm.

Action upon the case against a common carrier for a negligent discharge of his duty in conveying plaintiff's goods. Motion in arrest of judgment, upon the ground that the declaration did not recite the custom of the realm. The Court agreed with the objection taken. See Com. Dig. Action on the case for Negligence, c. 2; Hearne's Pl. 76; Vid. Ent. 37. 38; Bro. Red. 11. 12; Clift. 38. 39; Mod. Ent. 91. 92. [174]

2. *RICH V. KNEELAND.* T. T. 11 Jac. 1 K. B. Hob. 17.

Rich brought an action on the case against Kneeland in B. R., and declared, that whereas the said K. was, on, &c. and long, &c. a common hoyman to carry goods by water for hire, from London to Milton, in Kent, and thence to London; and whereas by the custom of England, such carriers ought to keep the goods delivered to them to be carried safely, so that they should not be lost by the default of them or their servants; that he had delivered to the defendant, &c. a portmanteau, with 50l. in it, to be carried, &c. for which he gave him twopence, the same, &c.; and that the defendant had suffered the goods to be lost through default of him and his servant, on the, &c. Defendant pleaded

But this custom, being part of the common law, need not now be stated.†

* And a declaration, alleging damage done to goods, will be good, though it does not particularize the species of damage; Palm. 528; Herne's Pleader, 76. 77.

† And is better omitted as it tends to confound the distinction between special customs which ought to be pleaded, and the general custom of the realm, of which the courts are bound to take notice without pleading.

that the plaintiff, on, &c. did discharge him of the keeping them, which the plaintiff traversed; and the defendant demurred.

Note.—He pleads no discharge of the carrying; also the defendant, by demurrer, confesseth that there was no discharge of the carrying; and it was adjudged for the plaintiff. And now in the Exchequer Chamber, on error, the judgment is affirmed: and it was resolved, that though it was a custom of the realm, yet indeed it is common law. See Bac. Ab. in Carriers. Hargraves. Co. Litt. p. 89. a. n.; 3 Wils. 429.

3. CHAMBERLAIN V. COOKE. 2 Vent. 78. S. P. HENBERT V. LANE. Styl. 370.

Declaration in case against a carrier for the loss of goods, which were stated in the declaration thus—"20 sets of gold buttons, and a set of Turkey stones and garnets." The Court, upon an objection taken to such a description of the property stated to have been entrusted to carrier, on account of uncertainty, assimilated the case to an action of trover, and said—the declaration is certain enough to a common intent—for to such as are conversant with those things, a set is intended to be well known, and in what number the precious stones are usually placed in such sets. See 5 Rep. 346; 2 Salk. 643; 3 Wils. 292; Sty. 247. 419; Latch. 216; 2 Lord Raym. 901. 1219. 1529; 11 Mod. 66; 1 Mod. 289; 1 Lev. 301; 1 Vent. 106. 114; 2 Show. 315; Skin. 142; 1 Lord Raym. 588; 2 Salk. 654; 2 Str. 758. 827. 810; Earnes. 276; Wils. 70.

4. It will be here sufficient to refer to the previous part of this division, in order to afford a fuller illustration of the rules which, in addition to what has been stated above, govern the form of the declaration in an action upon the case against a carrier. In p. 169, *ante*, the necessity of setting out in the declaration any exceptions to, or limitations of, the carrier's general responsibility has been considered; and in page 172, *ante*, the statement of the *termini* of the journey or voyage has been pointed out. The propriety of stating the breach of duty according to the fact, *ante*, p. 173, and what averments are sufficient to admit of proof of gross negligence, *ante*, p. 173, have been also noticed.

5. It will be recollected, that when considering the nature of an action upon the case against common carriers, and endeavouring to ascertain whether it was to be viewed as an *action ex delicto*, or *quasi ex contractu*, cases were abridged, which, from an omission of any allegation in the declaration (which were against ship owners), that they were the owners of a general ship carrying the goods of all who chose to send them, a plea of abatement averring the non-joinder of certain part-owners was upheld. It is presumed, that had such a count been inserted, the decision of the judges would have been different; and if not, it is apparent, from subsequent cases, that their judgment could have been reversed on appeal. It may be, therefore, advisable to insert such a count in the declaration, according to the fact, so as to insure the ability of the plaintiff: depriving the defendant of that privilege which he would have enjoyed in an action of *assumpsit*, and thereby avoid the temptation that is held out to litigious or infamous parties to a suit to create a multiplicity of useless pleas, and incur an unnecessary expense; for as this plea cannot be taken advantage of, after a general imparlance, it is seldom of much use in point of fact; and which, as every new defendant who may be successively brought forward, and disclosed by successive pleas in abatement, may in his turn plead that there are still other parties to the contract, who ought to be, and have not been joined, as defendants, opens a door to endless vexation and expense, as against the plaintiff in successive stages of unprofitable delay; *vide* Ca. Temp. Hard. 194.

2. Of the subsequent pleadings.

The plea of the general issue depends upon the form of action adopted by the plaintiff; if case, it is *not guilty*; if *assumpsit*, *non-assumpsit*. Whether this action be considered as founded in contract or *tort* the remedies by action upon the case or *assumpsit* still fall within the general class of actions, which, in the Statute of Limitations, are called *actions upon the case*; and must therefore be prosecuted within the period prescribed by that statute, which limits the commencement of such action to within six years from the time such cause of action accrued. The defendant may, therefore, when such rule has not been

In describing the property in the declaration it is said that the goods must be specified with the same certainty as in trover.

The other rules which are applicable to this form of action, have been already collected when considering the form of the declaration in *assumpsit*.

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It may be, however, advisable to state, that in framing a declaration in case against carriers, it is in all instances expedient to insert according to the fact, a count stating defendants to be owners of a general conveyance, carrying the goods of all indiscriminately, otherwise a plea in abatement may be made available.

Subsequent pleadings.

complied with, avail himself of the objection by pleading the fact in bar.

4th. *Of payment of money into court.*

1. *When allowed.*

1. HALLET V. THE EAST INDIA COMPANY. H. T. 1761. K. B. 2 Burr. 1121.
HULTON V. BOLTER. 1 H. Bl. 299. n.

In this case, upon a motion being made to pay money into court, Lord Mansfield said, that in motions of this kind, where the defendant applies to pay money into court, and to have the demand struck out of the declaration, the law arises upon the fact; and the true and sensible distinction is, that where the sum demanded is a sum certain, or capable of being ascertained by mere computation, without leaving any other sort of discretion to be exercised by the jury, it is right and reasonable to admit the defendant to pay the money into court, and have so much of the plaintiff's demand upon him struck out of the declaration; and that if the plaintiff will not accept it, he shall proceed at his peril.

2. HUTTON V. BOLTON. E. T. 1783. K. B. 1 H. Bl. 299. n.

This was an action against a carrier for the loss of a trunk. Though the loss, in point of value, was full 50*l.* the defendant moved for leave to pay 20*l.* into court, upon an affidavit, stating that he had long since published an advertisement that he would not be answerable for any parcels committed to his care above the value of 20*l.* unless he was paid in proportion to the risk; and that though the property lost in the present case exceeded that value, yet he was not informed, nor paid any thing extraordinary for the carriage. It was contended, that no man could pay money into court unless he could plead a tender, which could not be done in the case before the court, as nothing specific could be relied on, as though the jury would give the value of the goods by their verdict, yet they might, nevertheless, extend it to damages for such inconveniences as the plaintiff might have sustained from the non-delivery of them; and that as to the advertisement, which was the sole ground of the application, the fact must be tried whether the plaintiff had any notice of it. But the Court said—Upon principle we see no difficulty in suffering the money to be paid into court. This is an action of *assumpsit*, and the goods are stated to have been of a specific value. The declaration does not state any particular damage or inconvenience in consequence of, and independent of the loss, and therefore the plaintiff cannot recover beyond the value of the goods in question; for which reason the declaration does not differ from the common case of goods sold and delivered. It is a declaration on the face of it only for the value of the goods. The defendant might have pleaded the fact, and a tender of the 20*l.* If so, this case comes within the general rule. As to the notice of the advertisement, it is open to be tried. See 1 T. R. 710; 8 id. 47; 1 Taunt. 166. 491; 1 B. & P. 161; 1 Smith. 338; 5 T. R. 67; 2 Taunt. 317; 2 B. & P. 234; 3 B. & P. 14; 7 T. R. 36; 3 Burr. 1370; 2 Bl. 1050. 1190; Tidd's Pr. 5th edit. p. 620; and post, tit. Payment of money into Court.

3. FAIL V. PICKFORD. T. T. 1800. C. P. 2. B. & P. 234.

Assumpsit against a carrier, to recover the value of a quantity of tea lost by the sinking of the defendant's barge. On a motion to be allowed to pay the invoice price into court, it was refused, inasmuch as it could not be done without violating the principle which had been established as the rule upon this subject, not to allow money to be paid into court in cases of uncertain damages; and Heath, J. observed—If we could find any principle upon which this application could be allowed, we should be very well inclined to grant it. Where there is any contract between the parties upon which the Court can rest it may be done; but in this case there is no such contract. Suppose an action on the case were brought for negligently driving a carriage, in consequence of which the plaintiff's leg was broken, it could not surely be contended that the defendant could pay into court the amount of the surgeon's bill. This case stands on the same footing.

2. *Effect of such payment.*

1. CLARKE V. GRAY. T. T. 1805. K. B. 3 East. 564; S. C. 2 Smith. 622,

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It being a general rule that where the demand consists of a sum certain, or capable of being ascertained by mere computation, without leaving any sort of discretion to be exercised by the jury, the defendant will be permitted to pay money into court;

In an action against a carrier, the defendant was permitted to pay into court a sum amounting to what he swore he had limited his responsibility

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But in *assumpsit* to recover the loss sustained upon goods which had been spoiled by the sinking of the vessel, in which they had been loaded, the defendant was not allowed to pay the invoice price into court.

The payment of money into court is an acknowledgment of the plaintiff's liability, and the defendant's admission of the contract, which they considered as an admission of the contract laid in the declaration, between the carrier and the other litigant party, but does not admit collation and distinct parts of it, respecting the liquidation [178] after a right to them has accrued by a breach of the contract. A contrary rule was, however, at one time said to exist.*

Lord Ellenborough, in delivering the judgment of the Court in this case, and alluding to the case of *Yate v. Willan*, *infra*, in which it will be seen the declaration was framed generally as for a loss by a carrier, owing to his negligence in the conveyance of the goods, and in which 5*l.* the amount, to which it appeared defendant had restrained his responsibility, had been paid into court, the contract which they considered as an admission of the contract laid in the declaration, and therefore entitled the plaintiff to recover the full value of the goods in question, said—It appears to us, that the case of *Yate v. Willan* cannot be supported in its full extent; for although the payment of money in that case did admit the contract as stated in the declaration, it did not admit a contract incompatible with the restrictive provision as to the amount of damages to be recovered in case of loss.

2. YATE V WILLAN. M. T. 1801. K. B. 2 East. 128.

This was an action of *assumpsit* for the loss of a trunk of the value of 15*l.* The declaration stated a general undertaking by the defendant to carry goods for hire, and the defendant paid 5*l.* into court. At the trial the defendant wished to avail himself of a notice "that he would not be responsible for more than of damages 5*l.* for any property lost, unless the same was booked and paid for according to the value;" but the court refused to permit such a course to be adopted; and said—It is too late now to say, that the payment of money into Court is not an admission of the contract so stated in the declaration on which it is so paid. In this case it admits the general agreement declared on to be answerable for safe carriage of the goods; whereas the real defence is, that the defendant did not make a general, but a particular and limited agreement to be answerable; and, therefore, if the defendant had denied it altogether, the plaintiff must, upon this evidence, have been nonsuited.

* If, indeed, the stipulations of the carrier be of such a nature as will discharge him from all liability under the contract, unless the plaintiff has complied with the conditions (as was the case in *Clay v. Willan*, 1 H. Bl. 298. where the goods were not to be accounted for to any amount, unless properly entered and paid for), that will not merely operate in reduction of the damages, but in bar of the action; and therefore in such a case, if the defendant pay money into court on a declaration against a carrier in the common form, he cannot afterwards give in evidence such a provision which entirely negatives the contract as stated in the declaration. Such a position rests on too clear and broad a principle to be doubted, or require further elucidation. But if any scruples existed, or may happen to be created, as to its propriety, from the subsequent tenor of this note, many authorities which are founded upon the same basis might be referred to; as for instance in an action on a bill of exchange, the defendant by paying money into court generally, dispenses with the regular proof of the party's handwriting; 2 H. Bl. 374; Peake. N. P. C. 15; and cannot object to the sufficiency of the stamp on which the bill is drawn; 3 Camp. 40. So in an action of covenant he admits the execution of the deed; 2 Campb. 357; 2 T. R. 275. So in an action to recover the amount of the sale of goods which have been sold by sample at a particular price, the defendant will not be allowed to show after such general payment into court, that the goods were of a quality inferior to the sample; 2 Starkie. N. P. C. 103. And in an action upon a promise to pay another person's debt, he cannot insist after paying money into court on the count charging him with such promise, that the promise is not binding, because not written and signed as the statute of frauds directs. Many other examples might be adduced; but from the nature of those which have been cited, it will be seen that the Courts would sanction the proposition which is stated in the beginning of this note. These cases have been decided upon the hypothesis, that a defendant paying money into court must be aware he admits a legal liability of some sort or another; whereas, were the points disputed in those cases allowed to be canvassed, a direct admission of the contract could no longer be supposed to attach, as they tend in fact to nullify and invalidate the contract altogether. But upon what substantial and tenable grounds the doctrine contained in the case of *Yate and Willan*, *supra*, p. 177. can be upheld and sustained; with what degree of plausibility it can be maintained, that a carrier's limitation of his general liability is not to be considered as a distinct independent proviso; but as a term and qualification annexed to, and making a part of the original contract of carriage itself, and thereby varying that responsibility for the entire value of the goods which the custom of the realm or the general undertaking to carry safely, stated in the declaration, would otherwise cast upon the carrier; and how in fact it can be possibly urged, that the payment of money into court admits a contract incompatible with the restrictive provision as to the amount of damages to be recovered in case of loss, is not a problem so simply and easily solved—Not only, however, may the advocates and supporters of such opinion have recourse to the adjudication in the case of *Yate and Willan*; they will also find such arguments corroborated by a reference to some of our elementary writers; *vide* Jeremy on the Law of Car-

5th. Of the evidence.

1. On the part of the plaintiff.*

1. STROTHER v. WILLAN. E. T. 1814. C. P. 4. Campb. N. P. C. 24.

To prove that defendants, against whom this action was brought as common carriers, for the loss of a parcel sent by their coach, an entry in the book kept in the proper office in Somerset House, stating the defendants to be licensed as owners of the said coach, was put in; but Gibbs, C. J. said—this entry not being signed by the defendants, and nothing being shown to connect them with it, I am of opinion that it is no evidence whatever to prove them to be owners of the coach. See 14 East. 226; 4 Taunt. 802; 3 Campb. 456; 4 Campb. 90.

2. TUCKER v. CRACKLIN. T. T. 1818 K. B. 2 Starkie. 388.

The following question arose in this case—viz. whether, in an action of *assumpsit* against a carrier for the loss of goods, it was incumbent on the plaintiff to give evidence to show that the goods had never arrived, or the defendant was bound to show that they had been delivered. Abbott, J. seemed to be of opinion, that to support an averment of loss, it was enough for the plaintiff to show that the goods in fact had not arrived. See 1 Wils. 281; 2 Esp. 533; 4 id. 259; 2 Campb. 79.

riers, p. 129. n. But if the real effect of paying money into court be again adverted to and examined, an answer may be made to such a construction of those cases. It is indeed an act which affords evidence of the ground of action, and so far it ought to be admitted and no farther, unless after the establishment of the payment into court itself, it necessarily follows, that having made it, the defendant must owe more than the sum paid in, in which case the jury would be warranted in finding that also, provided the defendant did not negative the fact of any more money being due by showing payment. But where that is not the inevitable consequence; if it does not follow, that because he made the contract, he therefore owes the money; if a state of things may exist in which he would be liable for the sum paid in and no more, he is not by the act of paying in the money made liable further; 2 M. & S. 106. In fact, the cause is in all material respects in the same situation after such payment as before. Accordingly the courts have held, that the admission of the contract, such as is evidenced by payment of money into court, does not preclude the plaintiff from availing himself of those proofs, *ultra* such payment, which he might otherwise have taken advantage of. In an action on a valued policy, such payment upon a count stating a total loss by capture is no admission of a total loss, but the plaintiff is bound to prove that he suffered damage from the capture beyond the amount of the sum paid into court; 1 Campb. 557; 1 Taunt. 419. So in an action for goods sold and delivered, the plaintiff must prove that the goods *ultra* the payment were his property, although before the money was paid into court a bill of particulars was delivered to defendant, stating that the action was brought for a lot of goods sold for the plaintiff to defendant, by plaintiff's broker. Upon the same ground the payment of money into court has been considered not to admit the average price alleged in a declaration to be paid for the price of goods sold to the defendant; 2 B. & A. 116; or to preclude the defendant from availing himself of his infancy, 2 Esp. 482. n. From these analogous cases it is clear, that where a limitation has been annexed to the real contract, the effect of which is under certain circumstances to preclude the plaintiff from recovering more than a specified sum, the defendant, although he has paid money into court generally, may prove the limitation, and show that the plaintiff is not entitled to recover more than has been paid into court. It has been, indeed, urged, that if the law be as stated in *Clarke v. Gray*, though the payment does admit the contract as stated in the declaration, yet that it does not admit a contract irreconcilable with the terms of a public notice; the Court and jury will have to decide between the contract in the declaration and another set up in evidence, which is in effect an issue which of the two contracts really existed, and which of the two was intended to be acted upon by the carrier; *vide* *Jeremy*, 131. n. But the carrier's obligation to carry safely not depending on the question of compensation to be paid in case of loss, but being wholly collateral thereto, and the proper office of the notice being consequently to limit the province of the jury in the assessment of damages for a contract broken, and having no concern with it as long as it is executory, and in the course of its performance, such argument does not hold. Consistently therefore with authority and principle, the case of *Clarke v. Gray* seems to deserve to be considered the valid and binding authority.

* In addition to what is stated in the text, it may be proper to add that the plaintiff's general evidence in case of actions brought against carriers of persons, is proof by the plaintiff of the usual engagement to carry him, by evidence that he has taken his place, or that defendant has expressly undertaken to convey him, and that the former has been guilty of negligence, which may be either proved by glaring acts of improper conduct, or by such facts as amount to *prima facie* evidence of misfeasance, which have been already examined into. In suits instituted against common carriers of goods, the evidence in general

The entry in the office in Somerset House for licensing stage coaches, is no evidence to prove that the persons named in the license are the owners of the coach. [179] set House for licensing stage coaches, is no evidence to prove that the persons named in the license are the owners of the coach. [180] But afterwards being brought the contract home to the defendant by his signature, or connexion in some other way.

As by his receipt for the goods; it is sufficient for the plaintiff to show that the goods have in fact not arrived.*

3. SAMUEL V. DARCH. II. T. 1817. K. B. 2 Starkie. N. P. C. 60. LEUKNOR V. PLANT, H. T. 1769. K. B. 11 Mod. 274.

Per Cur. A carrier's receipt for goods is evidence of the contract which may have been entered into between himself and the owner of the property, the plaintiff confided for a time to his care and custody. See 1. Stark. 236.

4. GRIFFITHS V. LEE. T. T. 1823. N. P. 1. C. & P. 110.

In *assumpsit* against a carrier for negligence in carrying a parcel, directed for the plaintiff, the shopman of the latter stated, that he was not aware that the parcel had been delivered, and that if it had been delivered, the circumstance must have reached his knowledge. Hullock, B. held that this evidence was sufficient to throw on the defendant the proof of delivery.—Verdict for the plaintiff.

Of which, the declaration of the consignee's shopman, that he must have known of their arrival, if such had been the case, would be *prima facie* evidence.

5. OLIVE V. EAVES. T. T. 1817. 2 Starkie. N. P. C. 181.

A promise made by the book-keeper of a carrier at the office to make compensation for the loss of a parcel, cannot, however, be adduced against the carrier as evidence of such non-arrival, unless the book-keeper be shown to be his general agent;

Action against a common carrier for the loss of a parcel. Proof was attempted to be given of a conversation which took place soon after the loss happened, at the defendant's office, between witness and the bookkeeper, to whom the parcel had been delivered, upon which occasion the bookkeeper made an offer to pay 5*l.* for the parcel. But Lord Ellenborough said—what the book-keeper says is not evidence for the purpose of binding his principal, unless you prove that he is employed as a general agent, and that the principal ratifies the promises which he makes.

6. STREETER V. HORLOCH T. T. 1822. C. P. 1 Bingham's Rep. 36.

In which case he would be of course liable according to the strict terms of his undertaking, although it has been holden, that a promise stated as made in consideration that the plaintiff

This was an action against defendant as a common carrier, for not delivering goods according to contract. A verdict had been found for the plaintiff. A rule nisi had been obtained for setting aside such verdict, and entering a nonsuit, on the ground of the following alleged discrepancy between the contract set forth in the declaration and the evidence adduced in support of it; adduced is, proof of a contract expressed or implied; a delivery of the goods; and the defendant's breach of promise or duty. The plaintiff usually relies upon an implied contract, proving that the defendant is a common carrier; but where the defendant has expressly undertaken to convey the goods safely and securely, the *onus* is then thrown on him of proving the exact terms of the defendant's undertaking. When the declaration is in *assumpsit*, the plaintiff must, as in other cases, establish a joint promise as by proof, that *all* the defendants were proprietors or otherwise. The other material averments in the declaration must be proved as they are set forth; *vide ante*, division, "Of the Pleadings." He must proceed to the proof of a delivery to the defendant, so as to charge him with the custody of the goods; *vide ante*, p. 66; as that they were deposited in the care of one acting as his agent at the office, warehouse, or other place of business, or of an agent conducting his coach or waggon in its usual course. When it is to be apprehended that the carrier will defend himself upon the ground that the goods were improperly packed for the journey, the former should be prepared to rebut such fact. Any receipt or entry in the defendant's book upon the delivery of the property should be produced, and also the way-bill, if the goods were sent by a coach, so as to establish the place of destination, which may be however proved by production of the written direction. But the plaintiff will not be required to prove a property in the goods; *vide ante*, p. 74; although it is necessary that he should be able to prove what the goods consisted of, and their value, to enable him to do which, in the event of a loss, it is advisable that he should not pack them himself, but leave that to a servant or agent, who can speak to these circumstances if called upon. as the owner cannot be a witness in his own cause; as in nine cases out of ten it happens, that when property is lost or damaged in the hands of a carrier, the owner loses his remedy for want of the necessary evidence which may always be obviated by observing this caution. After having so far established the defendant's contract and his receipt of the goods, it suffices for the plaintiff to show that the goods in fact have not been delivered to the party to whom they were directed; *vide supra*; and see p. 164, where some rules of evidence as to the proof of a conversion in cases of trover being the form of action adopted are laid down.

* For it is said that every thing is a negligence which the law does not excuse, and to prevent collusive litigation and the necessity of going into circumstances impossible to be unravelled, the law always presumes against the carrier unless he shows that he is excepted from the liability he would otherwise incur by proof of the injury having been done by the king's enemies, or by such act as could not happen by the intervention of man, such as storms, lightnings, tempests, &c.; *vide ante*.

that the declaration stated a promise made upon a past consideration: viz. in consideration that the plaintiff *had caused* to be shipped, &c. whereas it appeared by the evidence, that the plaintiff had entered into an engagement to deliver the plaintiff's goods at A., before the goods, or at least before the whole of the goods, had been actually shipped; and therefore it was contended, that the declaration ought to have stated the consideration for the promise in an *executory* form, namely, that the plaintiff *would cause* to be shipped, &c. *Per Cur.* The declaration may be supported in its present form. Wherever, as in this case, an order is given previously to the delivery of goods to a bailee, to deal with them when delivered in a particular manner, to which he assents, and afterwards the goods are delivered to him accordingly, a duty arises on his part, upon the receipt by him of the goods, to deal with them according to the order previously given and assented to; and the law infers an implied promise by him to perform such duty. In the present case the plaintiff might have charged the defendant, not upon the original contract entered into by him at the time of signing the agreement, but upon the implied promise resulting from the execution of the consideration in his favour, and stated the promise thus, "to do his duty in that behalf;" which would only have been a more concise mode of stating that which is, in effect, stated in this declaration.

7. HARRIS V. PACKWOOD. M. T. 1810. C. P. 3 Taunt. 264.

In this case, in which a notice restrictive of the defendant's liability as a common carrier was introduced, it was argued, that as a specific sum was paid for the carriage, and something was to be paid over and above the carriage for insurance, the word insurance must be applied to those risks against which a carrier is bound by law to insure, *qua insurer*; as fire, robbers, armed force, and the like; and that the sum required for insurance must be received as the price of guarding against those accidents; but that without the payment of any such insurance, he was still bound to guard against loss by exposure, carelessness, driving into a river, or the like; otherwise a carrier might receive the price of carrying the goods, and nevertheless be as careless as he pleased: that it was incumbent, therefore, on the defendant—to show that he took reasonable care of them—not on the plaintiff's—to prove a negative, and that the defendant took no care of them. A verdict was found for the plaintiff, with liberty to defendant to move for a new trial, or nonsuit, as he might be advised. A rule *nisi* was accordingly obtained to enter a nonsuit, which the Court now made absolute.

8. FABREN V. ADDAMS. E. T. 10 Car. MSS. B. N. P. 69. c.

The Court held, that it would be good evidence in an action against a carrier for driving his cart, so that a pipe of wine burst, and was lost, to show that the wine was upon the ferment, and when the pipe burst he was driving negligently.

(2) On the part of the defendant.

1. DALE V. HALL. M. T. 1750. K. B. 1 Wils. 281.

Action against a hoyman, who undertook to carry the plaintiff's goods. Breach in duty—that they were damaged by negligence. At the trial it was

* And in *assumpsit* in the usual form, evidence of gross negligence is admissible for this purpose, although the declaration contained no such averment, because the notice not constituting a special contract does not appear on the record, but only arises in defence of the carrier, and therefore it may be rebutted by proof of positive negligence; see *Smith v. Horne*, abridged *ante*, p. 114.

† It being a well known general rule of law, that a carrier is liable for all losses and injuries to the goods, except such as arise from the act of God or the king's enemies he must, if he would guard himself against the damages the jury would otherwise award against him, be ready to produce evidence establishing the facts, which led to his inability to return the property, entrusted to his care, in the same state it was delivered to him. If the loss arise from the act of God, as for instance, from lightning, or from the goods having been sunk in the vessel in which they were sent, in consequence of a sudden squall of wind, or that they had been thrown overboard to lighten the vessel, in order to save the passengers in a storm, the defendant should be prepared to bring forward, as witnesses, the parties who may have been present at the time of the accident; such as the passengers, crew of the vessel, &c.; *vide post*, p. 183; and others who may be able to swear to such circumstances. See also subsequent note.

had caused the goods to be shipped and delivered, &c. is supported by proof of an undertaking by defendant, although antecedent to such delivery; and that the action might be well maintained as upon a duty arising upon the execution of the consideration. Should the defendant have issued a general notice limiting his responsibility, and the plaintiff wish to deprive the defendant of its benefit, [182] fit, he must show the particular circumstances upon which he relies.* And be prepared to repel any anticipated exculpation Upon proof of delivery to a carrier he will be required to show that he has fulfilled his duty.†

[183] insisted for the defendant, that as the plaintiff had proved no particular negligence in the defendant, that he might be permitted to give in evidence, that he had taken all possible care of the goods; that the rats made a leak in the keel or hoy, whereby the goods were spoiled by the water coming in; and that they pumped, and did all they could to prevent the goods being damaged. The judge permitted this evidence to be given, and thereupon left it to the jury, who found a verdict for defendant. A motion was now made for a new trial, when it was insisted for the plaintiff, that the evidence given for the defendant ought not to have been received. *Per Cur.* We are of opinion, that the evidence given for the defendant was not admissible. The defendant agrees, for hire, to carry and deliver the goods safe; and the breach assigned is, that they were damaged by negligence. This is no more than what the law says—every thing is a negligence in a carrier or hoyman that the law does not excuse, and he is answerable for goods the instant he receives them into his custody; and in all events, except they happen to be damaged by the act of God, or the king's enemies; and a promise to carry safely is a promise to keep safely.

2. BENNETT v. CLOUGH. E. T. 1818. K. B. 1 B. & A. 461.

And if he seek to evade his liability to answer for the loss of a parcel under the pretence of the carriage of it having been an illegal act, he must adduce some *prima facie* evidence to lay the foundation of his objection. If he would show that he is not responsible by virtue of a general notice written upon a board which is in laid in a wall, he may prove it by means of an examined copy.*

A parcel, containing bank-notes, stamps, and a letter, was sent by a common carrier, from one stamp distributor to another. In an action brought against a carrier for the loss of it, a question arose, whether the circumstance of the letter accompanying the stamps was *prima facie* evidence that it relates to them, so as to bring the case within the proviso of the 42 Geo 3. c. 81. s. 6. which enacts, that the prohibition to send letters otherwise than by the post, should not extend to letters sent by any common carrier with, and for the purpose of, being delivered with the goods that the letter concerned; and whether the defendant, not having proved the letter to relate to any other subject matter, was liable for the value of the parcel? The Court held, that the presumption was, that the letter which accompanied the stamps related to them, as an illegality was never presumed till the contrary was proved.

3. CORDEN v. BOLTON. E. T. 1809. 2 Campb. N. P. C. 108.

Lord Ellenborough held, in this case, that it was sufficient evidence of the contents of a board, which had been inlaid in the wall of defendant's office, who was a common carrier, to the effect that he would not be answerable for plate or jewels, *however small the value*, unless entered and paid for as such, to produce an examined copy of the board.

(3) *Of the witnesses.*

1. BUCKMAN v. LEVI. E. T. 1813. K. B. 3 Campb. N. P. C. 414.

This action for goods sold and delivered involved the question of the competency of a servant to prove the delivery of goods to a carrier. A servant of the plaintiff stated that he carried to the wharf of A. B. certain chairs for the purpose of consigning them to the defendant, by the carrier running his vessel between London and the place of the defendant's residence; that he left the goods at the wharf properly directed, but took no receipt for them, nor

* The various cases relative to public notices, the instances in which carriers have made them available, the circumstances which have been looked upon as a waiver of the privilege, whether arising from notice of value, or from fraud and concealment, practised on the part of the bailor of the property, have been already considered; *ante*, p. 94, &c. It may be however stated as a general rule, that the carrier must prove in the first place that the plaintiff had notice of the defendant's circumstances. The burden of proof lies upon defendant. It is not sufficient to show that he has used means to give notice; he must prove that such measures have been effectual. A direct communication is indeed rarely made. The means usually adopted for this purpose are; the publication of an advertisement in a newspaper; posting a notice in some conspicuous part of the office or place where the carrier transacts his business; or the circulating of hand-bills. Where these means are not adopted, or prove ineffectual, other circumstances may exist from which a knowledge of the notice may be inferred. In the next place, if the notice be brought home to the plaintiff, it must appear in point of law, it is sufficient to protect the defendant in the particular instance, either *in toto* or *pro tanto*. This of course is a pure legal matter for the consideration of the Court.

* A party interested in the establishment of a particular fact will not in general be admitted to prove it; but among others, an exception in favour of trade has been allowed. "A party interested will be admitted for the sake of trade and the common usage of business,

[184] A servant is a good witness to prove a delivery of goods to a carrier.†

booked them in the defendant's name; and that the only person whom he saw on the wharf, but to whom he did not speak, was a man whom, from his situation, he imagined to be the wharfinger's servant. The witness was not objected to, but the verdict was found for the defendant for want of due diligence on the servant's part.

2. *SPENCER v. GOULDING*. T. T. 1793. K. B. Peake. N. P. C. 129.

The plaintiff, in order to establish that a parcel conveyed by the defendants, as common carriers, had been delivered contrary to the direction, produced a witness, who swore that the parcel was directed to "*Richard Spencer*; to be left at the *White Bear*, Piccadilly, till called for." The evidence to oppose this was that of the carrier's book-keeper, who swore that the parcel was left at the office at Worcester, directed for "*Elizabeth Spencer*, to be left at the *Black Bear*, Piccadilly." This witness was objected to as interested, unless a release were produced. But it was holden that the situation of the witness rendered it necessary to admit his evidence, as he might be the only person present when the parcel was delivered, and as the defendant would, in his absence, be wholly deprived of a defence, however meritorious. See 3 Campb.

144.

3. *SPITTY v. BOWENS*, E. T. 1791. Peake. N. P. C. 53.

In order to prove that the plaintiff had sustained an injury from the negligence of the defendant, in not placing a buoy over a barge belonging to the plaintiff, and which had been sunk, the witness produced was the barge-master, whom the plaintiff had released in order to the admission of his evidence, which was objected to, on the ground that the witness would be entitled to compensation from the defendant equally with the plaintiff, in establishing which right, the record in the present action might be produced. But Lord Kenyon thought the objection untenable, and admitted the witness.

4. *LAY v. HOLOCK*. M. T. 1811. N. P. Peake. 101.

Assumpsit for injury to corn sent by defendant's vessel, as a common carrier. The captain was called by the plaintiff to prove that the injury had been sustained in consequence of the vessel being unfit for service; but he was objected-

therefore a porter shall be evidence to prove a delivery of the goods;" B. N. P. 289; 11 Mod. 262. So the carrier himself is often a witness of necessity. As "in an action against a hundred by the master, being a carrier, for a robbery committed on his servant, in the absence of the master; *query*, whether the master, being the plaintiff in the action brought may be a witness to prove that he delivered the moneys of which his servant swears he was robbed, for this might be proved by any other, and no person is to be a witness in his own cause but for necessity; as if he himself had been robbed, although he was plaintiff, yet he might be a good witness to prove himself to have been robbed, and of what sum or things, and also to prove that he gave notice to the next vill and levied hue and cry, for this is of necessity for default of other proof. But as to proving the delivery of the money to his servant before the robbery, and before he set out on his journey, this might be proved by another as well as by him; although it was objected that it is not safe nor usual for men to call witnesses when they deliver money to carry on a journey on account of the danger of a discovery; and for this reason (*per curiam*) against my opinion it was ruled that he should be received as a witness." *Per Rolle*, C. J. 2 Abr. 685. Mic. 1650; *Bennet v. Hundred of Hartford*. So it was ruled by *Chambre*, J. Monmouth, Spring Assizes, 1802, MSS; *Porter v. Hundred of Ragland*; *Jeremy on Carriers*. 128. n. that where a mob had robbed the plaintiff's barge of corn, but his servant could not prove the quantity on board, the plaintiff might be admitted to prove that fact.

* In which case the servant would be interested to defeat the action, since a verdict against the master might be given in evidence in an action by him against the servant as to the quantum of damages; see 4 T. R. 689; 1 Esp. 389; 6 id. 78; 2 Sh. 1083; 1 Camp. 255.

† In an action on the case for managing the defendant's vessel so negligently, that it ran down the plaintiff's barge, the declaration set forth that he was possessed of the said barge laden with divers goods and merchandizes; and *Holt*, C. J. would not suffer the pilot to be a witness, because he was answerable, if faulty in steering, to the master, nor would he suffer any damages to be recovered for the goods because they were not properly set forth; see *Martyn v. Hendrickson*, 1 Salk. 287. So in an action on a policy of insurance on the plaintiff's goods, the owner of the vessel is not a competent witness without a release to prove that the vessel was staunch and sea-worthy, for otherwise he would be liable on his implied warranty that the vessel was staunch, and therefore he comes to exonerate himself; *Rotheroe v. Elton*, Peake. N. P. C. 84.

So a book-keeper to a carrier is a good witness for him; Or in fact any other appointed receiver of goods. He is often so of necessity being the only agent on the part of the carrier interfe

[185] ring in the contract, and need not be released, unless where the injury arises from his own negligent act* And there thereby exists an immediate interest.†

A carrier employed by A. to carry a sum of money to B. is a good witness from necessity, without a release, in an action for money had and received, brought by A. against C., to prove that by mistake he delivered it to C.

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And where ever a release is requisite, it suffices if given by one of several carriers in partnership.
The amount of damages depends upon the extent of the carrier's liability being established to answer for the whole value.

If no fraud be established on the part of the carrier, the presumption will be against the carrier.

It has been already seen, that common carriers [187] may indict those who feloniously obtain the

ed to, it being his interest to establish that fact, as it would exonerate him from his responsibility to the defendant, in case negligence, in managing the vessel, should be proved. The Court held that he was clearly admissible, as the record in this case could not avail him if sued by defendant, as he would still be open to an action for negligence, if such were proved.

5. *BARKER v. MACRAE*. M. T. 3 Campb. N. P. C. 144.

It appeared that the plaintiff was a shopkeeper in the country, and being indebted to A. and the defendant, who were accustomed to supply her with goods from London, sent a sum of money by the hands of C. the carrier who usually carried his goods, to be paid to A. C. by mistake paid it to the defendant, and on the defendant sending in his bill, the plaintiff, not knowing of the mistake, discharged the claim a second time, whereon the present action was brought, and C. was called to prove the error. Lord Ellenborough was of opinion, that the necessity of the case rendered it incumbent on them to admit C. as a witness without a release.

6. *HOCKLESS v. MITCHELL*. M. T. 1801. K. B. 4 Esp. 86.

Trespass by plaintiffs, joint-owners of a sloop, against a lieutenant of his majesty's navy, for cutting away and destroying the sails and rigging. The defendant, it appeared, commanded a gun brig, which was lying at anchor in the Thames; and the defendant pleaded in justification of his conduct, that the plaintiffs' servant conducted the sloop, which was sailing down the river, so carelessly, that she ran foul, and he necessarily cut the sail, &c. to extricate her. To rebut this, the plaintiffs called the sailing master, who was released, but it appearing that the release was executed by only one of the plaintiffs, it was urged for the defendant, that he was inadmissible. But it was holden, that such release was sufficient, as if an action for neglect were brought by the plaintiffs against the witness, it must be joint; to which this would be pleadable in bar.

6. Of the damages.

1. *HUTTON v. BOLTON*. E. T. 1783. K. B. 1 H. Bl. 229. n.

Per Buller, J. This is an action of *assumpsit*, and the goods are stated to have been of a specific value: the declaration does not state any particular damage or inconvenience in consequence of, and independent of the loss; and therefore the plaintiff cannot recover beyond the value of the goods in question; for which reason the declaration does not differ from the common case of goods sold and delivered. It is a declaration on the face of it only for the value of the goods.

It is a declaration on the face of it only for the value, or to the extent to which he has succeeded in limiting his responsibility by the terms of his notice.*

2. *CLUNNES v. PEZZEY*. M. T. 1807. K. B. 1 Campb. N. P. C. 8.

Assumpsit for goods sold by a liquor merchant, and the only proof as to the contents of the bottles delivered, being by the plaintiff's servants, who could not speak to the quality of the contents, the jury, in the absence of all fraud, were directed to presume them filled with the cheapest liquor in which the plaintiff dealt. See 1 Str. 505.

plaintiff's demand, unless there be clear proof of the value of the goods lost. But if the conduct of the carrier be at all tainted with fraud, a contrary rule will hold.

(B) REMEDIES BY CARRIERS, BY INDICTMENT.

1st. By Carriers.

It has been seen, *ante*, p. 70, that upon the delivery of goods to a carrier, he obtains such a temporary right of property, as to enable him to indict those who may feloniously deprive him of them; or by any false and deceitful representations obtain them from him; in which indictment he may describe the property as his own.

* And also upon the fact of, whether any loss has accrued to the plaintiff *ultra* the deprivation of his property, &c. consequent upon non-delivery of the goods; for if any particular detriment accruing to the plaintiff, independent of the loss, and arising in consequence of a breach of duty, or contract of the carrier be alleged, in the declaration, the jury will be authorized to take such matters into their consideration, and return a verdict commensurate with the aggregate loss, the plaintiff may have sustained; see *Porter v. Home*, K. B. 1826. MSS.

2d. Against Carriers.

1. WYNNE'S CASE. Old Bailey Sessions. 1786. 1 Leach. C. L. 413; S. C. 2 East 664. 697.

property in their custody.

A box was left in a hackney-coach, and all possible means afterwards used to discover the coachman. After a considerable time, he was apprehended, and the box was found in his possession; but the hasps had been forced off, and several articles contained therein were missing. At the trial, the judge (Mr. Baron Eyre) observed, that as the prisoner had not originally taken possession of the property himself, but had it thrown upon him by the negligence of the prosecutor, no felonious intention could be supposed to exist in his mind at the moment the property was first acquired; and although the subsequent keeping it till it was advertised was a breach of moral duty, it could not of itself be legally considered as a criminal conversion; he, therefore, directed the jury to acquit the prisoner, if they thought he had detained the box merely in hope of a reward being offered for its restoration; but if they were satisfied he had opened it, not merely from idle curiosity, but with an intention to embezzle any part of its contents, and had actually taken the goods mentioned in the indictment, it would be a matter of legal consideration, whether a person so guilty should not be deemed a felon. The jury found the prisoner guilty; but the judgment was respited. It was afterwards approved of by the judges, and he received sentence of transportation for seven years.

A tortious conversion of property delivered into the possession of a carrier may be a fraud or breach of trust in him, but it cannot make him guilty of felony.

The moment, however, such temporary property is extinguished, the carrier may, like anyone else, be guilty of felony.

2 If a man delivers goods to a carrier to carry to Dover, and he carries them away, it is no felony; but if the carrier have a bale or trunk, with goods delivered to him, and he breaks the bale or trunk, and takes away the goods *animo furandi*; or if he carries the whole pack to the place appointed, and then carries it away *animo furandi*, this is a felonious taking by the book 13 E. 4. 9; see 1 Roll. Abr. 73; Staundford. 25.

3. SEAR'S CASE. Old Bailey Sessions 1789. 1 Leach. C. L. 415 n. Rxx v LAMB. Old Bailey Sessions. 1694. Cited 2 East. c. 16. s. 99. from the MSS. of Mr Justice Foster. [188]

John Sears was indicted before Mr. Justice Ashhurst, for stealing a parcel of calico and other articles, the property of Sarah Dixon. The prosecutrix hired the prisoner, a hackney-coachman, to drive her from her house in Manchester-buildings, to a linen-draper's in Oxford-road, where she purchased the articles named in the indictment. They were tied up in a parcel, and put into the coach. The prisoner drove back to Manchester-buildings, and the prosecutrix, on getting out of the coach, ordered him to give the parcel to her servant, but he neglected so to do. She went into the parlour to speak to company; and in about two minutes returned to the street-door, where she saw the coach-door shut, and the window up; and after giving him three shillings, which was sixpence more than his fare, because he had driven expeditiously, he drove away. The things were advertised, and a reward offered to any person who should restore them, but without effect. A few days afterwards, the prosecutrix met the prisoner, but he denied all knowledge of the person, or of the things, or of his ever having had such a fare, and said that he had only driven the coach two days. The parcel, however, was traced to the prisoner's possession; and it appeared that it had been opened, and three yards taken off from the piece of calico. The prisoner on his defence acknowledged that he had driven the prosecutrix from Manchester-buildings to the linen-draper's, and back again; but he denied that she ever desired him to deliver the parcel to her servant. Upon this evidence he was convicted of felony, and re-

If he afterwards take the property *animo furandi*,

* There is a special case wherein it is said, that a man may commit larceny by stealing his own goods delivered to the carrier, with intent to make him answer for them; for the carrier had a special kind of property in the goods; in respect whereof, if a stranger had stolen them, he might have been indicted generally as having stolen the said carrier's goods, and the injury is altogether as great, and the fraud as base, where they are taken away by the very owner; 1 Hawk. c. 84. s. 30.

† If the carrier unpack the goods, the very act itself determines the trust possession, and the subsequent taking is felonious, for the thing committed to his trust is single and entire; 21 H. 8. pl. 14; Dalton, C. 102; 1 Hawk. c. 38. s. 52,

Although it would seem that the offence will be even considered complete, if he received the goods into his possession with a criminal intent.*

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ceived sentence of imprisonment for six months, by virtue of the statutes of 5 Anne. c. 6; and 19 Geo. 3. c. 74. s. 3.

1. **ACTION** Old Bailey Sessions. 1701. 1 Leach. C. L. 415. Kel. 81. 82. This case was, that a woman had trusted a porter to carry a bundle for her to Wapping, and went with the porter; and in going to the place the porter ran away with the bundle, which was lost; and being tried for felony on this fact, Holt, C. J. directed the jury, that if they thought that the porter opened the bundle, and took out the goods, it was felony, and they ought to find him guilty; and he thought that the fact as above stated was evidence of it; 2 East. 697, but Mr. East states a different ground for the determination as suggested in another manuscript; namely, that all the circumstances of the case showed that the porter took the bundle at the first with an intent to steal it; 1 East P. C. 698.

Carrying away Tithes. See *post*, tit. *Tithes*.

Carrying in the Roll. See *post*, tit. *Doggell*.

Capias ad Satisfaciendum. See *ante*, tit. *Capias ad Satisfaciendum*.

Case, Action on the.

I. WHEN **BY** AND AGAINST WHOM IT LIES, p. 191.

(A) WITH REFERENCE TO THE PARTICULAR CHARACTER OR CAPACITY OF THE PARTY.

See *tit.* Alien, Ambassador, Attorney, Auction and Auctioneer, Bail, Bankrupt, Baron and Feme, Coroner, Executor and Administrator, Hundred, Infant, Inn-keeper, Insolvent Debtor, Judge, Justice of the Peace, Lunatic, Master and Servant, Partners and Partnership, Pawnbrokers, Pilot, Principal and Agent, Sheriff, Slave, Surgeon, Wharfinger, Witness, West India Company.

(B) WITH REFERENCE TO INJURIES TO REAL PROPERTY CORPOREAL, p. 194. And see *tit.* Dilapidations, Fences, Fixtures, Nuisance, Trespass, Waste, Water-courses.

[190] (C) WITH REFERENCE TO INJURIES TO REAL PROPERTY INCORPOREAL, p. 194. And see *tit.* Conies, Dignities, Distress, Easement, Fairs, Franchise, Fishery, Heriot, Market, Offices, Peer, River, Tithes, Tolls, Water-course, Way.

(D) WITH REFERENCE TO INJURIES TO PERSONAL PROPERTY, p. 194.

See *tit.* Accident, Animal, Injuries by and to, Bailment, Cemetery, Concoys, Carriers, Copyright, Deceit, Decoy, Distress, Driving, Actions for negligently, False Return, Farrier, Fences, Fixtures, Heriot, Hundred, Inn-keeper, Justice of the Peace, Landlord and Tenant, Mill, Partners and Partnership, Patent, Peer, Replevin, Rescue, Reservoir, River, Sheriff, Ship and Shipping, Tombs, Trespass, Trover, Warranty.

(E) WITH REFERENCE TO ITS APPLICABILITY AS A REMEDY FOR BREACHES OF CONTRACT, p. 194.

(F) WITH REFERENCE TO INJURIES TO PERSONS INDIVIDUALLY, p. 195.

See *tit.* Bail, Carriers, Driving, Action for negligently, Escape, False Return, Highway, Imprisonment, Inn-keeper, Justice of the Peace, Libel, Malicious Arrest, Malicious Prosecution, Nuisance, Partner and Partnership, Post-office, Perjury, Physician, School and Schoolmaster, Sheriff, Slander, Surgeon, Witness.

(G) WITH REFERENCE TO INJURIES TO PERSONS RELATIVELY, p. 196.

See *tit.* Adultery, Baron and Feme, Driving, Highway, Imprisonment, Master and Servant, Nuisance, Parent and Child, School and Schoolmaster,

* No doubt can exist as to what is to be considered a breach of trust or positive felony, in respect to servants of the post-office (who, it will be, however, remembered, *ante*, p. 61, are not to be looked upon as common carriers), the legislature having by express enactments declared their sentiments on the subject; see 5 Geo. 2. c. 25. s. 17; and 17 Geo. 3. c. 50. s. 1; and see Leach. Crown Cases. 43. and 106. 349. 1082; and *post*, tit. Post-office.

Seduction, Surgeon, Trespass.

(H) WITH REFERENCE TO ITS APPLICABILITY AS A REMEDY FOR THE RECOVERY OF PENALTIES ON PENAL STATUTES, p. 196.

II. HOLDING TO BAIL IN, p. 196.

III. PLEADINGS.

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(A) DECLARATION.

(a) *Tit. Of the court and term.* See *post*, tit. Declaration.

(b) *As to the venue*, p. 196.

(c) *Statement of the cause of action*, p. 197.

(B) PLEAS, &c. p. 197.

IV. JUDGMENT AND COSTS, p. 197.

I. WHEN, BY, AND AGAINST WHOM IT LIES.

An action on the case is, as the phrase itself significantly denotes, a remedy of very general application and utility. It conveys to the mind the satisfactory implication, that no injury can be sustained without a concomitant and adequate medium of redress. Its origin may be traced to the impracticability of even the most acute and sedulous jurist defining the nature of every civil wrong which one member of the community can experience from another. The earliest writs and processes were necessarily confined to the most obvious kinds of injuries; for whilst mankind was in a crude and infant state, the extent and diversity of human evil was scarcely perceptible; but the progress of society soon disclosed its magnitude. Cases of aggression arose, novel in their circumstances, and beyond the scope of any writs then known in practice, or within the limits affixed to the power of the person whose duty it was to prepare judicial process. The Statute of Westminster, 2. 13 Edw. 1. c. 24. therefore provides, that as often as it shall happen in the Chancery, that in one case a writ is found, and in a like case (in *consimili casu*) falling under the same right, and requiring like remedy, no writ is to be found, the clerks of the Chancery shall agree in making a writ, or adjourn the complaint till the next parliament, and write the cases in which they cannot agree, and refer them to the next parliament, &c. Under the sanction of this statute, the clerks of Chancery constructed many writs for different injuries, which were considered as in *consimili casu* bearing a certain analogy to a trespass. The writs of trespass, though invented thus, *pro re nata*, in various forms, according to the nature of the different wrongs which respectively called them forth, began, nevertheless, to be viewed as constituting, collectively a new individual form of action; and this new genus took its place by the name of trespass on the case among the more ancient actions of debt, covenant, trespass, &c. Such being the nature of this action, it comprises, of course, many different species, and affords new channels for redress. Hence, where neither law nor practice has expressly, and in terms defined the kind of remedy to be instituted for an injury, actions are daily brought "on the case" itself; that is, on a legal and recognized form of statement of the injurious circumstances constituting, or occasioning, such claim to redress or compensation. The following may be deemed an accurate and comprehensive definition—The writ of trespass upon the case lies where a party sues for damages for any wrong, or cause of complaint to which covenant or trespass will not apply; Stephen on Pl. 15; 3 Woodd. 167. In a preceding volume (*ante*, vol. ii. p. 414.) it has been shown, that in an action of *assumpsit* is included in the term, "action on the case;" but, at the present time, when that species of action is mentioned, it is usually understood to mean an action in form *ex delicto*. It was, therefore, in the case of the Huddersfield Canal Company v. Buckley (*abridged ante*, p. 11.) decided, that under an act of parliament empowering the company to sue for calls, &c. by action of debt or on the case, that an action in form *ex delicto* was maintainable, notwithstanding the defendant might thereby be deprived of the advantage of availing him-

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self of a set-off or counter claim. Actions on the case are founded on the common law or particular statutory provisions, and lie generally to receive damages for consequential wrongs, or torts, to persons individually or relatively, or to personal property in possession or reversion, or real property corporeal or incorporeal, or some right or privilege incident or appertaining thereto.

These suits arise either from malfeasance, or doing an act which the defendant ought not to do; or misfeasance, being the improper performance of some acts which might legally be done; or nonfeasance or the omission of some act he ought to do; and these several injuries are commonly the doing or omitting some act contrary to the general obligation of the law, or the particular rights or duties of the parties, or some express or implied contract between them.

Under the tit. Actions ante, vol. i p. 181.) has been already collected the decisions defining the nature of an action on the case its general utility and limits, and the well known, though often difficult to preserve, boundary between actions of trespass *vi et armis*, and actions on the case. The applicability of an action of trespass on the case, we may remember, is technically dependant on the peculiar nature and circumstances which characterise the injury; for if it be committed by direct force either actual or implied, or occasioned by the immediate act of the defendant, trespass *vi et armis* is the proper remedy; 3 East 600; an injury is considered as immediate when the act complained of *itself*, and not merely a consequence resulting from it, occasions the injury—thus, if a log of wood be thrown into a highway, and in its descent to the ground strike another, the injury proceeds direct and immediate from the original act; 3 East. 596; and where a lighted squib was thrown in a market-place, and afterwards thrown about by several in self-defence, and ultimately hurt the plaintiff, the injury was adjudged to be the *immediate act* of the first thrower, and consequently a *trespass*, and that all the movements subsequent to the original throwing were merely a continuation of the first act and original force; 2 Bl. Rep. 392; 3 Wils. 403. But if the injury be not, in legal contemplation, forcible, or not direct and immediate on the commission of the act, but only [133] consequential, then the appropriate form is an action on the case: 3 East. 593; 2 T. R. 231; Lord Raym. 1399; 1 Stra. 634; 8 T. R. 19; which may be briefly illustrated by the preceding example respecting the log of wood; for, if in that case the injury had not proceeded from the immediate act of throwing it down, but in consequence of its continuing in the highway, and a passenger had been hurt by falling over or against it, it being a consequence of the antecedent act of the defendant, the mode of redress would be by action on the case; 1 Stra. 636; 5 T. R. 649; 3 East. 602.

The design or intention of a wrong doer is no criterion as to the form of action to be adopted; 2 Bl. 832; 3 East. 601; for where the act occasioning an injury is originally unlawful, although committed inadvertently, without the assent or concurrence of the mind: 2 East. 107; 6 East. 464; 8 T. R. 190; and the injury occasioned by it be *immediate*, trespass is the proper remedy, without reference to the intention of the defendant; and the legality or the illegality of the original act does not appear to afford any criterion; 3 Wils. 409; 2 M. 894; 6 East. 599; whether the injury was immediate or consequential; for a person may become an immediate trespasser, even in the performance of a lawful act; 1 Stra. 596; 3 Wils. 411; or if he be guilty of neglect, and unintentionally injure another while performing his duty, he will be equally responsible as if the original act had been unlawful; 11 Mod. 160; 2 Bl. Rep. 895; and, under these circumstances, recourse must be had to the primary rule, to ascertain whether the injury was direct and immediate, or mediate and consequential; in the former the proper remedy would be trespass; in the latter an action on the case; 2 Bl. Rep. 892.

In the case of injuries arising from improperly driving carriages, or navigating vessels, if the wrong done was direct, and be stated in the declaration to have been wilfully committed, or appear in evidence on the trial to have been so, the action must be trespass *vi et armis*; 3 East. 691; 8 T. R. 188; but if the injury were attributable to negligence, though it were immediate the party

injured has an election, either to consider the negligence of the defendant as the cause of action, and proceed in case, or he may treat the act itself as the injury, and adopt an action of trespass: 3 East 601; 2 N. R. 117.

But it is principally in actions for running down, or damaging ships, that difficulties as to the form occur, because the force which gives rise to the injury is not, in such case, necessarily the immediate act of the person steering; for the wind and waves may, and generally do, occasion the force, and the personal efforts of the party rather consists in putting the vessel in a position to be acted upon by the current or wind, than by any improvident management or neglect; consequently, in an action *on the case* for running with great force and violence against the ship of the plaintiff, it was determined, on a motion in arrest of judgment, after verdict for the plaintiff, on the hypothesis that the action should have been trespass instead of case, that the jury having found a verdict for the plaintiff, the Court would consider the complaint, as set forth in the declaration, was substantiated in evidence; and for such a wrong, an action on the case was a proper remedy; 8 T. R. 188. 1 Bos. & Pul. 472. Having thus summarily reviewed the general doctrine, it will only be necessary, in this place, to state, that the decisions further illustrating the rules just expounded, will be found arranged according to the subject matter affected by the injury, or according to the means used to accomplish the aggression.

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(B) WITH REFERENCE TO INJURIES TO REAL PROPERTY CORPOREAL.

Case is an appropriate remedy for any consequential injury to a party's real property corporeal, as for placing a spout near the plaintiff's land, so that the water afterwards ran thereon, or for causing water to run from the defendant's lands to that of the plaintiff, see *Reynold v. Clarke*, *ante*, vol. i. p. 183; obstructing light or air through ancient windows (see *post*, tit. Nuisance); or for injuries to water-courses; or for any other species of mediate damage to houses or lands, or to a decoy; see *post* tit. Decoy; or where the plaintiff's property is only in reversion; see *Com. Dig. Action; Case; Nuisance*, (B) *post*, tit. Nuisance; Trespass; Waste. But where the injury to real property corporeal is immediate or committed on land in the possession of the plaintiff, the remedy is trespass; see this explained, *supra*; and *ante*, vol. i. p. 181.

(C) WITH REFERENCE TO INJURIES TO REAL PROPERTY INCORPOREAL.

As an action of trespass is only sustainable for direct aggressions to tangible things, as the person, personal chattels, and real property corporeal, and not for the redress of injuries to the health of individuals, their personal character, or real property incorporeal, it follows, that case is the only proper mode of redress for wrongs done by disturbance of common, or encroachments on the right to offices, franchises, ferries, markets, tolls, or ancient mills, or obstructing the plaintiff in the enjoyment of pews, or private ways, or other incorporeal right.

(D) WITH REFERENCE TO INJURIES TO PERSONAL PROPERTY.

The principal decisions and rules connected with this division have been already collected and expounded, *ante*, vol. i. p. 187; it only remains here to observe, that for all injuries to personal property, not committed with force, or immediate, or where the plaintiff's right to the chattel is in reversion, case is the proper remedy.

(E) WITH REFERENCE TO THE APPLICABILITY OF AN ACTION ON THE CASE AS A REMEDY FOR BREACHES OF CONTRACT.

This action, we have seen, is a concurrent remedy in some cases with *assumpsit*, for breaches of contract, whether the breach were nonfeasance, misfeasance, or malfeasance; see *ante*, vol. i. p. 170. We may remember also, that in *Dickson v. Clifton*, vol. i. p. 170, it was holden, that where the breach of an express contract amounts to a tort, the party injured, may, at his election, bring either *assumpsit* or trespass, and that, therefore, case lies upon an express agreement for obstructing the plaintiff in the enjoyment of an easement of which the defendant stipulated that the plaintiff should have the benefit, *ante*, vol. i. p. 171; and where there is an express or implied contract, the tort may be waived, or the plaintiff may proceed on the former, *ante*, vol. i. p.

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171, *et seq.* Case is also a proper remedy against bailees for neglect in the care of goods, *ante*, tit. Bailment; and from *Judin v. Samuel*, 1 N. R. 43, it would seem, that case lies for not accounting for the produce of bills delivered to the defendant to get discounted; there the first count of the declaration was in trover for bills of Exchange; and the second and third counts stated the delivery of the bills to the defendant, in order that he might get them discounted for a certain amount, and his having got them discounted; and his converting and disposing of the money to his own use. The defendant demurred generally, on the ground of a misjoinder of *tort* and contract, the subject of the last counts being matter of contract; but the Court held, on general demurrer, that as all the counts were in the form of *tort*, if any count were good, judgment must be given for the plaintiff. It is in many cases important, where these concurrent remedies present themselves for the redress of the same injury that a judicious selection should be made. Thus where an action in form *ex delicto* is brought, the defendant cannot be arrested without a special order of the Court, or of a judge; therefore in cases where it may be material to have the security of bail, the action should, if possible, be framed in *assumpsit* for money had and received, adding such other counts in the declaration as may be advisable under the circumstances of each particular case; see *Govett v. Radnidge*, 3 East. 76. But in exercising this discretion, it is always material to consider the effect it would produce on the *ulterior* proceedings in the cause, as by a prudent choice of a remedy, the defendant may be frequently precluded from availing himself of a defence which he might, otherwise, establish. Thus, by waiving the right to bail, and bringing an action in *tort*, a set-off may be avoided, as where goods have been sold by a person in contemplation of bankruptcy, by way of fraudulent preference to a creditor, the remedy for the assignees should be trover, and not *assumpsit*, because in the latter form of action, the defendant might avail himself of the debt due from the bankrupt as a counter claim; see 2 H. Bl. 135; 4 T. R. 211; 6 T. R. 695; 3 East. 70; 10 id. 392; 12 id. 605; so in some instances, by proceeding in case instead of *assumpsit*, a defendant may be precluded from availing himself of his certificate.

(F) WITH REFERENCE TO INJURIES TO PERSONS INDIVIDUALLY.

This action is maintainable for all kinds of injuries done to the absolute rights of persons, *not immediate, but consequential*, as for a malicious arrest under regular process; or malicious prosecution; or for keeping mischievous animals, having a knowledge of their dangerous propensity; see *ante*, vol. i. p. 618; or for personal damage arising from a public nuisance; or for injuries to the health or reputation of individuals, or for acts of sheriffs, justices, or other officers, acting ministerially, and not judicially; or against surgeons, or other professional persons, for want of necessary skill. But where the act complained of has been done under judicial, but *irregular* process, the remedy must be *trespass, vi et armis*; see 2 T. R. 225.

The remedy for maliciously suing out a commission of bankruptcy has been already pointed out; *ante*, vol. iii. p. 925.

(G) WITH REFERENCE TO INJURIES TO PERSONS RELATIVELY.

The applicability of an action on the case as a mode of redressing injuries to relative rights is governed by the general question of, whether it is really brought for the force, or for the consequential loss ensuing from the previous violence. See the appropriate titles of Adultery, Baron and Feme, Master and Servant, and Parent and Child, &c.

(H) WITH REFERENCE TO ITS APPLICABILITY AS A REMEDY FOR THE RECOVERY OF PENALTIES UNDER PENAL STATUTES.

Whenever a statute prohibits an injury to an individual, or enacts that he shall recover a penalty or damages for such injury, though the statute be silent as to the form of the remedy, this action may be supported; *Com. Dit. tit. Action upon Statute A. F.*; and we have seen (*ante*, p. 12.), that it has been decided, that where a navigation act empowered the company to sue for calls, &c. by action of debt, or on the case, that an action on the case in *tort* might

be supported; and if a statute give a remedy in the affirmative, without a negative, and expressed or implied, for a matter which was actionable by the common law, the party may sue at common law as well as upon the statute; Com. Dig. Action upon Stat. C.; see *post*, tit. Conviction, Distress, Hundred, Riot Act.

II. HOLDEN TO BAIL IN.

The defendant cannot in this action be holden to bail, however aggravated the circumstances out of which the cause of action accrued without a judge's order being first obtained; see *post*, tit. Libel, Scandalum, Magnatum, Slander.

III. PLEADINGS.

(A) DECLARATION.

(b) *As to the venue.*

This is a transitory action, and the venue may therefore be laid in any county.

(c) *Statement of the cause of action.*

The declaration ought not to state the injury to have been committed, *vi et armis*; nor should it conclude *contra pacem*; but as the decisions connected with the divisions are necessarily applicable, rather to the description of particular injuries, or referable to the general rules to be observed in the framing of declarations, it has been thought better to place them under the particular titles, than introduce them here. [197]

(B) PLEAS, &c.

The general issue in this action is not guilty under which any matter may be given in evidence as a defence except the statute of limitations and such a plea will put the plaintiff upon the proof of the whole of the charge contained in the declaration. This rule, however, does not apply to or extend to actions for words or a libel, for the defendant under the alleged calumny cannot give in evidence the truth of the words, even in mitigation of damages, but he must justify not guilty specially, stating all the circumstances; see *post*, tit. Libel, Slander.

IV. JUDGMENT AND COSTS.

The ordinary judgment in action on the case is, that the plaintiff do recover the sum found by the jury in damages, with full costs of suit, to which he is entitled, although he recover a verdict for less than 40s. damages, unless the judge certify under the statute 43 Eliz. c. 6. s. 2. which enacts that if in a personal action, not being for any title or interest in lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it shall be certified by the judge before whom it shall be tried, that the damages to be recovered therein do not amount to 40s. the plaintiff shall have no more costs than damages; see 1 Hullock on Costs, 19. 27; 2 Stra. 1232; 1 Wils. 93; Say. 260; 3 T. R. 87 *post*, tit. Costs.

Cart.

REX V. POWELL. H. T. 1792. K. B. 4 T. R. 572; S. C. Nol. 45.

On an information, on the 24 Geo. 3. sess. 2 c. 27 against the defendant, for the penalty incurred by his having driven a certain cart within five miles of Temple Bar, not having his name and place of abode entered with the commissioners for licensing hackney coaches, and not having, upon some conspicuous part of such cart, the number of the vehicle, &c. as directed by the preceding statute. It appeared, that the defendant resided at Parson's-green, which was more than five miles from Temple Bar, and was not within the bills of mortality; and that the defendant had been seen driving his cart in a certain place called Old-street-road, in the county of Middlesex. The defendant was convicted before a justice, to pay the penalty of 40s. to be applied, &c. [198] This conviction coming before the Court, they said: the justice had exceeded his authority. We must look to the words of the statute—"that no persons whatever drive any cart within five miles of Temple Bar, without the name and place of abode of the owner be registered with the commissioners for licensing such limits. The 24 G. 3, requiring the owner of carts to enter their residence, does not apply to those persons who do not live within five miles of Temple Bar even though the carts be driven within such limits."

hackney coaches, and the name and number of his cart painted upon *some* conspicuous part of it." Had the legislature have stopped there, however inconvenient such a construction must have been to persons residing remote from the capital, yet we must have said the law was so written, and that it affected all persons equally whose carts might happen to come within those limits. But going on further, we find words which seem awkwardly to restrain those regulations to persons residing within five miles of Temple Bar; for it adds, "that the owner of such cart, &c. so *residing and driving* within five miles of *Temple Bar*, shall incur penalties for such neglect" by which it appears to us to mean, that the penalty should be inflicted only where the owner resides, and the cart is driven within those limits. The evidence proving that the defendant was resident more than five miles from Temple Bar, we think that the case is not within the act, and the conviction must be quashed.

Case reserved.

PALMER V. JOHNSON. E. T. 1763. C. P. 2 Wils 163.

In a case reserved for the opinion of the Court, the facts proved at the trial ought to be stated and not the evidence of such facts. This was an action of trespass for cutting down the plaintiff's trees at Branton common, in the county of Huntingdon. Upon not guilty pleaded there was a verdict for the plaintiff, subject to the opinion of the Court upon a case reserved. At the trial of the plaintiff, in order to prove he was in possession of the place in which, &c., produced in evidence a paper writing, purporting to be an admission of the plaintiff to the place in question, as being copyhold, in trust for J. S., by the lord of the manor of B. It was stated, that the trees were cut down on Branton common by the defendant, and that the plaintiff himself was not a commoner, but was a trustee of J. S., who had a right of common. For the defendant it was argued that, upon the trial of this cause, there was neither proof of title or possession in the plaintiff of the place in question; nor did the case state any fact of title or possession in the plaintiff; it only stating that a paper writing, importing to be an admission of the plaintiff in trust, &c. was proved; but that this did not prove that the estate was copyhold; it being only presumptive evidence that it was of that description of tenure. The fact that the place in which, &c. was copyhold ought to have been stated; so that neither of the facts, that the plaintiff had title or possession are stated, and therefore the plaintiff cannot have this action. And of that opinion were the Court, and set aside the verdict, but without costs.

[199] Cassetur billa vel breve.*

MILES V. ANDREWS, E. T. 1794. K. B. 5 T. R. 634.

After an entry of *cassetur billa vel breve*, during the same term, a declaration by the by may be delivered. The defendant having pleaded in abatement that she was executrix and not administratrix, the plaintiff entered on the roll *quod billa cassetur et defendens eat sine die*, and in the same term delivered a declaration by the bye, which the defendant refused to accept, but it was left with him. On motion to set aside the proceedings for irregularity, the Court said—that the proceedings were regular; that the defendant was in court during the whole term; and that, consequently, the plaintiff might deliver a declaration against him at any time during that period.—Rule discharged.

* This phrase imports that the bill or writ be quashed, and is the proper course to be pursued when the plaintiff cannot prosecute his writ or bill with effect against the defendant, in consequence of some allegation on the defendant's part, and the plaintiff is, therefore, desirous of avoiding any future proceedings in that suit, he enters on the roll a judgment, of *cassetur billa vel breve*, the effect of which is to quash his own bill or writ, and he then avoids the payment of costs to the defendant, and enables himself to commence a new process. For the purpose of making this entry, a roll should be obtained of the term of the declaration, and the declaration and plea entered thereon, after which the roll is taken to, and docketed with the clerk of the judgments in the King's Bench, and the master having marked the *cassetur billa* thereon, it is filed with the clerk of the treasury: Imp. Prac. K. B. 291. In the Common Pleas the roll is docketed, and filed with the prothonotaries: Imp. Prac. C. P. 327-8.

The plaintiff being allowed to take out a summons to amend on payment of costs the entering a *cassetur billa vel breve* is not frequently adopted in practice, see *ante*, tit. Amendment.

Cast. See tit. *Piracy*.

Castigatory for Scolds. See tit. *Scolds*.

Castration. See tit. *Maimem*.

Casual Ejector. See tit. *Ejectionment*.

Catalla.

BULLOCK V. DODDS. H. T. 1819. K. B. 2, B. & A. 276.

Per Abbott, C. J. The words *bona et catalla* jointly or seperately, in our *Bona et ca* ancient statutes and law writers, denote personal property of every kind as *talla* is the distinguished from real. Thus Magna Charta, c. 18. which provides, that the term the king's debt shall be first paid, and residue remain to the executors of the used in con debtor, uses the words *bona et catalla*. See 31 Edw. 3. st. 1. c. 11. contradiction to real pro

Catalogue. See tits. *Auction; Frauds, Statute of*.

Cattle See tits. *Horses; Tithes*.

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II. OF DRIVING CATTLE, p. 200.

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VI. OF THE STATUTES REGULATING THE SLAUGHTERING OF CATTLE, p. 205.

VII. OF THE STATUTES PREVENTING CRUEL AND IMPROPER TREATMENT OF CATTLE p. 209.

I. OF THE IMPORTATION OF CATTLE.

Cattle may be import ed from the Isle of Man

By the 5 Geo. 3. c. 43. beasts may be freely imported from the Isle of Man.

By the 6th article of Union, 5 Anne, c. 8. no Scotch cattle carried into Eng- Scotland, land shall be liable to any other duties than the cattle of England are subject to. And Ire land duty perpetual by 16 Geo. 3. c. 8. all sorts of cattle may be imported from Ireland free. duty-free.

II. OF DRIVING CATTLE.

Cattle can not be driv en on a Sunday.

By 3. Car. 1. c. 1 no drovers are to travel with cattle on Sunday, under a penalty of 20s.

III. OF BUYING AND SELLING CATTLE.

Cattle is not to be sold twice alive in the same mar

No person shall buy an ox, cow, calf, &c. and sell the same again alive, in the same market or fair, on pain of forfeiting double the value; stats. 3 & 4 Edw. 6. c. 19; 3 Car. 1. c. 49. 8. And the act 3 & 4 Edw. 6. c. 19. is not repealed by 12 Geo. 3. c. 71. which repeals the general forestalling act of 5 ket. & 6 Edw. 6. c. 14. and other subsequent acts enforcing the same, but has no reference to any preceding act.

By 31 Geo. 2. c. 40. no saleman, broker, or factor employed in buying cat- And no fac tor is to buy or sell tle for others, shall buy and sell for *himself* in London, or within the bills of mor- on his own tality, under a penalty of double the value of the cattle bought or sold. account.

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IV. OF STEALING, KILLING, AND MAIMING CATTLE.*

1. CLAY'S CASE. Lent. Ass. 1819. Essex. cited 1 Dick. Just. 369; S. C. 1 Burn, J 445.

The prisoner was convicted of killing a lamb, with intent to steal part of the

By the 37 Hen. 8. c. 6. s. 4. it was enacted, "that if any person or persons maliciously, unlawfully, and willingly cut out, or cause to be cut out, the tongue or tongues of any tame beast or beasts, of any other person or persons, the said beast being then alive;" every such offender should not only forfeit to the party grieved treble damages for such offence, to be recovered by action of trespass, but should forfeit to the king for every such offence 10l. as a fine. By the 22 & 23 Car. 2. c. 7. s. 2, 3, 4. if any person shall in the

The 14 G. carcass. It appeared that the prisoner cut the leg from the animal whilst it was living, and carried the leg away before the animal died, so that the lamb was not completely killed at the time of the larceny. The judge passed sentence upon the prisoner, but a doubt arising whether, as the death-wound was given before the theft, the offence was made out, the question was submitted to the opinion of the judges, who were of opinion, that as the wound, which would necessarily produce death, was given before the larceny, the lamb was to be considered as killed from the time such wound was given, and that the conviction was right.

2. RAWLIN'S CASE. 2 East. P. C. 617.

The prisoner was indicted for stealing six lambs, and the fact proved was, that the carcasses of the lambs, without their skins, were found on the premises where they had been kept, and that the prisoner had sold the skins, which were identified the morning after the offence was committed. There was no count in the indictment for killing with intent to steal the carcass, or any part thereof; but as the lambs must have been removed from the fold, the jury were directed to find the prisoner guilty, which they did; but a doubt occurring, whether, as the 14 Geo. 2 c. 9. specifies feloniously driving away, and feloniously killing with intent to steal the whole, or any part of the carcass, as well as feloniously stealing in general, although there must be, in such cases, some removal of the thing, it did not intend to make these different offences. The case was submitted to the judges, who held the conviction right; for any removal of the thing, feloniously taken constitutes larceny.

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An indictment for stealing lambs is sustained by proof that the carcasses were found in the owner's ground, and only the skins taken away. So an indictment charging a party with the receipt of mutton from another who had been charged in the same indictment with stealing one live ewe sheep was holden correct.

3. COWELL AND GREEN'S CASE. 2 East. P. C. 617.

The prisoners were convicted upon an indictment, charging that "Cowell feloniously stole one live ewe sheep, the goods, &c. of J. L., and that Green received 20 pounds of mutton, part of the goods, &c. so as aforesaid, feloniously stolen, &c. knowing the same to have been stolen." On a question referred to the judges, whether the indictment were sufficient against the accessory, they all held the conviction to be proper.

night time maliciously, unlawfully, and willingly, kill or destroy any horses, sheep, or other cattle, he shall be guilty of felony, but without corruption of blood or loss of dower. But to avoid judgment of death, or execution thereupon, he may choose to be transported to some of the plantations to be mentioned in judgment, for seven years. Sec. 5. And if any person shall in the night time maliciously, unlawfully, and willingly, maim, wound, or otherwise hurt any horses, sheep, or other cattle, whereby the same shall not be killed or utterly destroyed, he shall forfeit treble damages by action of trespass, or upon the case. Sec. 6. And three justices may inquire by a jury and witnesses, and may issue warrants for summoning jurors, and for apprehending persons suspected, and take their examinations, and cause witnesses to come before them to give information on oath, so as no person to be examined shall be proceeded against for any offence concerning which he is examined as a witness, and shall make a true discovery; and if any person being summoned as such witness, refuse to appear, they may commit him till he submit to be examined on oath. By sec. 7. Offences within this act must be prosecuted within six months after the offence committed. And by the 9 Geo. 1. c. 22. s. 1. it is enacted, that if any person or persons (whether armed, or disguised, or not) shall unlawfully and maliciously kill, maim, or wound any cattle, or shall forcibly rescue any person, being lawfully in custody of any officer or other person for any the offences before-mentioned; or if any person or persons shall, by gift or promise of money, or other reward, procure any of his majesty's subjects to join him or them in any such unlawful act, every person so offending, being lawfully convicted thereof, shall be adjudged guilty of felony without benefit of clergy. But now by the 4 Geo. 4. c. 54. persons committing offences within this act are to be transported or imprisoned.

This act, after reciting that evil disposed persons had more generally and frequently than was ever known before, made it their practice secretly in the night time to drive away and steal a great number of sheep, and likewise secretly in the night time to kill great numbers of sheep and to strip off their skins and then steal the carcasses of the sheep so killed, leaving their skins behind to prevent discoveries, and also in like manner to kill great numbers of sheep, and then to cut open the said sheep so killed and take out and steal their inward fat, leaving their carcasses behind to prevent being discovered, enacts, "that if any person or persons shall feloniously drive away, or in any other manner feloniously steal one or more sheep, or other cattle, of any other person or persons whatsoever, or shall wilfully kill one or more sheep or other cattle of any other person or persons whatsoever, with a felonious intent to steal the whole carcass or carcasses, or any part or parts of the

4. *REX v. RANGER*. 1798. 2 East. P. C. 1074.

An indictment at common law charged, that the prisoner "on the 23d of May, with force and arms, at, &c. one black gelding, of the value of 30*l*. of the goods and chattels of W. C., then and there being, then and there unlawfully did maim, to the great damage of W. C., and against the peace, &c." with force. But upon reference to the judges, after conviction, they all held that the indictment contained no indictable offence; for if the case were not within the Black Act, the fact, within itself, was only a trespass; for that the words *vi et armis* did not necessarily imply force sufficient to support an indictment.

No indictment at common law lies for unlawfully maiming a horse.

5. *PEARCE'S CASE*. Sum. Ass. 1789. Gloucester 2 East. P. C. 1072. S. C. 1

Leach C. L. 527. S. P. *SHEPHERD'S CASE*. Oct. Sess. 1790. Old Bailey. G. 1.* only extends to cases where malice be entertained against the owner, and not merely against the animal.

1 Leach. C. L. 539; S. C. 2 East. P. C. 1073.

The prisoner was indicted on the 9 Geo. 1. for "feloniously, unlawfully, wilfully, and maliciously maiming and wounding a cow" of the prosecutor. It appeared that his intent was to commit bestiality with the animal, and that he had, in a passion, ran a sharp pointed stick through her body, because she would not stand quiet. But the judge directed an acquittal, it being necessary to show that the fact was committed from some malicious motive towards the owner, and not merely from an angry and passionate disposition towards the beast.

And the 9 G. 1.* only extends to cases where malice be entertained against the owner, and not merely against the animal. [203]

6. *ANON.* 2 East. P. C. 1073.

On an indictment on the 9 Geo. 1. it appearing that the prisoner had cut the tendons of the hinder legs of several sheep that had, at different times, broken into his enclosure, Heath J. was of opinion that the case was not within the statute.

As where the prisoner cut the beast because it broke his fences.

7. *REX v. RANGER*. 1798. 2 East. P. C. 1074.

On an indictment at common law charging the prisoner with unlawfully maiming a gelding, to the great damage of the prosecutor of 30*l*. The judges were of opinion, that in order to bring the case within the 9 Geo. 1. it was not necessary for the prosecutor to prove a previous existing malice against the owner.

But a previous existing malice against the owner need not be proved.†

8. *HAYWOOD'S CASE*. Sum. Ass. 1801. Coventry. 2 East. P. C. 1076 S. P. *REX v. HAYWOOD*, 1 R. & R. C. C. 16.

The prisoner was tried on an indictment on the 9 Geo. 1. for maliciously maiming, and for maliciously wounding a gelding, against the statute, &c. It appeared that the prisoner had maliciously, and with intent to injure the prosecutor, driven a nail into the frog of the horse's foot, which had, at the time, rendered the horse useless to the owner; but at the trial the prosecutor said, that the horse was likely to do well, and be perfectly sound again in a short time. After conviction judgment was respited upon a doubt whether, as the horse was likely to recover, and as the wound was not a permanent injury, the offence was within the statute. All the judges held the conviction right, the words of the 9 Geo. 1. being "shall unlawfully and maliciously kill, maim, or wound any cattle, &c.;" which word "wound" appears to be used as *contra*, distinguished from a permanent injury, such as maiming.

Or is it necessary that the wound of a permanent injurious nature.

carcase or carcases of any one or more sheep or other cattle that shall be so killed, or shall assist or aid any person or persons to commit any such offence or offences, that then the person or persons guilty of any such offence, being thereof convicted in due form of law, shall be adjudged guilty of felony, and shall suffer death, in cases of felony, without benefit of clergy." The words "other cattle" in this statute were of too "uncertain" signification, and consequently the 15 Geo. 2. c. 34. reciting that it was doubtful to what sorts of cattle besides sheep the act was meant and intended, enacts, that it construed, deemed, and taken to extend to any bull, cow, ox, steer, bullock, heifer, calf, and lamb, as well as sheep, and to no other cattle whatsoever.

* Chap. 22. s. 1. set out *ante*, 201. n. But now by the 4. Geo. 4. c. 54. it is rendered unnecessary to prove malice against the owner of the cattle.

† And therefore where it appeared that the prisoner in the night broke into a stable where here was a gelding which was to have run a race, and cut the sinews of the fore leg of the animal, in order to prevent its running, in consequence of which it died, he was indicted for killing the horse, and convicted; 2 Russ. 943; S. P. 3 Chit. C. L. 1087

Horses.
mares, &c.

9. *REX v. PATY.* Sum. Ass. 1770. 1 Leach. C. L. 72; S. C. 2 East. P. C. 1074; S. C. 2 Blac. 721.

The prisoner being capitally convicted on an indictment for feloniously, unlawfully, knowingly, wilfully, and maliciously shooting and killing one mare and one colt, against the 9 Geo. 1. c. 22. it was moved in arrest of judgment, 1st, that the mare and colt are not averred in the indictment to be cattle within the statute; and 2d, that the word cattle does not, by law, necessarily include horses, mares, and colts. Upon these objections the judgment was respited; but all the judges unanimously agreed, that as the statute 22 & 23 Car. 2. c. 7. had made the offence of killing horses by night a single felony, this statute 9 Geo. 1. was only to be considered as an extension of that act. Judgment of death was accordingly pronounced.

10. *REX v. CHAPPLE.* Sum. Ass. 1804. Exeter Cited 1 Burn. J. 447. S. P. *REX v. WITCHERLY.* Lent Ass. 1807. Sta ord, 1 Burn. J. 447. S. P. *REX v. CHAPPLE,* 1 R. & R. C. C. 77.

And pigs*
are cattle
within the
meaning of
the statute.

An indictment set forth, that the prisoner being an ill-designing and disorderly person, and of a wicked and malicious mind, on, &c. with force and arms, at. &c., three pigs, being swine and cattle of the value of 6*l.*, of the goods and chattels of W. A., then and there being, feloniously, unlawfully, wilfully, and maliciously, with and by means of poison, then and there did kill and destroy, against the form of the statute, &c. The prisoner was found guilty; but judgment was respited, that the opinion of the judges might be taken to ascertain, whether pigs were cattle within the meaning of the 9 Geo. 1. c. 22. The judges confirmed the conviction.

No person
shall sell
live cattle
within 40
days after
purchase.
And pro-
duce a cer-
tificate from
vendor to
prove the
sale,
Or forfeit
10*l.*
Or if he
produce a
false certi-
cate.
Duty of
drovers
when cattle
sicken on
the road.
Limitations
of actions,
&c. under
the act.

V. OF THE STATUTES TO PREVENT THE SPREADING OF INFECTIOUS DISTEMPOR AMONG CATTLE.

By 22 Geo. 2. c. 46. s. 27. passed for the prevention of distempers spreading among horned cattle, it is enacted, that no person shall dispose of any live cattle till they have been 40 days his property, and in proof of such property the seller shall produce a certificate from the person of whom he purchased, signifying the time of his purchasing the same: and every person, who shall sell any such cattle, without producing such certificate, and is convicted thereof by confession or oath of one or more credible witnesses, before any justice or justices of the same county, city or place, shall for every ox, bull, cow, calf, steer, or heifer, so sold, forfeit 10*l.* unless he make oath before such justice &c. that such ox, &c. has been his property for more than 40 days: the penalty being recoverable as in 19 G. 2. c. 5 (exp.) one moiety to the informer, and the other to the poor of the parish where the offence is committed, 22 G. 2. c. 46. s. 47. Sec. 23. Every person selling any such cattle, and giving a false certificate at their time of sale, and the person accepting the same knowing it to be such, shall forfeit 10*l.* recoverable and applicable as in s. 27 id. 328. Sec. 24. When drovers find any of their cattle sick on the road, so as to be unable to proceed on their journey, they shall give notice to the constable or churchwarden of the place where the beast sickens, that he may be slain and buried, having first slashed his skin, if he is deemed ill of the distemper now raging among the horned cattle, in the opinion of such constable, &c. and two substantial inhabitants of the place, whom he may summon to his assistance by note in writing. on penalty of 10*l.* to the poor of such parish, &c. from such drover for neglect thereof, or concealing or driving out of the way any such sick beast, to be levied on his goods by distress-warrant of a justice of any place where he is taken; and on non-payment shall be committed to gaol for six calendar months, or until he has paid the penalty, id. s. 29. Sec. 25. Actions commenced for things done in pursuance hereof, must be brought in six months. and the venue is local; the defendant may plead the general issue, and give the special matter in evidence, and on proof that the fact was done in pursuance hereof, or that venue is laid in wrong county, or that the six months

* And asses; *Rex v. Whitney,* 1 R. & M. C. C. 3. The indictment must specify the sort of cattle; alleging generally that the prisoner maimed certain cattle, is not sufficient; *Rex v. Chalkley,* R. & R. C. C. 258.

are elapsed, jury shall find for defendant. who shall have treble costs on such verdict, or if plaintiff discontinue after appearance, or is nonsuited, or have judgment against him on demurrer, or otherwise, *id.* s. 33.

VI. OF THE STATUTES REGULATING THE SLAUGHTERING OF CATTLE.

By the 26 Geo. 3 c. 71. s. 1. it is enacted that no person shall keep or use any house or place for the purpose of slaughtering or killing any horse, male, gelding, colt, filly, ass, mule, bull, cow, ox, heifer, calf, sheep, hog, goat, or other cattle, which shall not be killed for butcher's meat, without first taking out a licence at the quarter sessions for the county, riding, city, town, district, division, or liberty, where such slaughter-house is situate, and such sessions shall grant such licence upon a certificate under hand and seal of the minister and churchwardens, or overseers, or two substantial house-holders of the parish where the applicant for such licence shall dwell, that such person is fit to be trusted with such business; provided that in case of the death of any person, to whom such licence is granted, the widow, or personal representative of such person so dying, may carry on such business until the then next quarter sessions.

No place to be kept for slaughtering cattle without a licence from the quarter sessions.

and to be signed by three justices, and to be entered in a book kept by the clerk of the peace, for general inspection.

Six hours' notice must be given to the inspector

previous to slaughtering the cattle, whose duty it is to see that the cattle are slaughtered within certain hours.

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Persons li-

censed for slaughtering cattle are to keep a book to enter the name, place of abode, &c. of the persons who require to

By s. 2. every such licence shall be signed by the justices of such sessions, or the major part of them, and a copy thereof shall be entered in a book to be kept by the clerk of the peace for the county; and all persons may at all times, (*sundays excepted*), between the hours of 10 and 12, search the office of the clerk of the peace, wherein any such copy is entered, and make an extract from the same on the payment of 6d.; and all persons so licensed, shall affix over the door of the house, where he carries on such business, his name, and the words "licensed for slaughtering horses, pursuant to an act passed in the 26th year of his majesty King George the Third.

By s. 3. every occupier of such licensed house, shall, six hours previous to his slaughtering any horse, &c. as in s. 1. and which shall not be killed for butcher's meat; and previous to the flaying any horse, &c. brought dead to such slaughter-house, give notice in writing to a person appointed, as in s. 5. as inspector, that such inspector may take an exact account and description of the height, age, (as near as may be), colour and particular marks of every horse, mare, gelding, foal, filly, ass, or mule, and of the colour and marks of every cow, bull, heifer, ox, calf, sheep, hog, goat, or other cattle, brought alive or dead for such purposes; and no such horse, &c. shall be killed but between eight in the morning, and four in the evening, in October, November, December, January, February, and March; and between six a. m. and eight p. m. during the rest of the year; (See the penalty, *post*, s. 8. pl. 154.)

By s. 4. every person so licensed, shall, at the time any horse, &c. as in s. 1. is brought for the purpose of slaughtering or slaying, make an entry in a book of the name, and abode, and profession, of the owner, and also of the person who brought the same to be slaughtered or flayed, and the reason why the same was brought to be slaughtered or flayed, which reason the person bringing the same shall declare to such person so licensed; which book shall at all times be open for the examination of the inspector, to be appointed as in s. 5; and such licensed person shall attend with, and produce such book before any justice, when required, by warrant or order under the hand and seal of such justice, and shall likewise produce the same at every general quarter sessions held for the county.

By s. 5. such of the parishioners as are entitled to meet in vestry for choosing parish officers, shall, in every parish wherein such slaughtering-house shall be situated, annually or oftener, appoint one or more persons to be inspectors, to inspect every such slaughtering-house, to whom all occupiers and persons carrying on such business shall, six hours previous to his slaughtering or flaying any such horse, &c. as in s. 1. give notice in writing of his intention so to do; and such inspector shall, in person, or by his servants, attend at the slaughtering-house of the person so giving notice, and there take such account as in things men

have cattle slaughtering-house shall slain, Inspectors are to be appointed annually, who are to do certain things men

tioned in the act.

s. 3. directed; and such inspector shall keep a book, and therein make an entry of such account; and such person carrying on such business, shall for such entry pay to such inspector 6d.; and every person so desiring to inspect such book shall have access to the same between the hours in s. 3 mentioned, paying to such inspector for such search, 6d.; and such inspector shall cause to be painted over the door of the house where he resides, his name, and the words, inspector of houses and places for slaughtering horses; and in case such inspector shall, upon examination of any horse, &c. intended to be slaughtered have reason to believe that such horse, &c. is free from disease, and in a sound and serviceable state, or that the same has been stolen, or unlawfully come by, he shall prohibit the slaughtering of such horse, &c., for not exceeding eight days, and in the mean time shall cause an advertisement to be inserted in the daily advertiser, or some public newspaper circulated in the county where such slaughter-house shall be situated, twice, or oftener, unless the owner of such horse, &c. shall sooner claim the same, to certify under his hand, or otherwise inform the inspector that he sent such horse, &c. to be delivered to the person so licensed, for the purpose of being slaughtered, the expense of inserting such advertisement to be paid by the occupiers of such slaughtering-house to such inspector; and in case such occupier shall refuse to pay the same, and shall be thereof convicted on the oath of such inspector before one justice for the county, &c., he shall forfeit double the amount of the charge of such advertisement, to be raised by distress and sale of the goods, by warrant under the hand and seal of such justice. See 26 Geo. 3. c. 71 s. 5.

If the inspector makes a search in the night time, it must be in [207] presence of a constable. Persons of stable, to enter into and inspect such place, and also any stable, &c. and freely soring hors to examine and see any horse, &c. then and there being, and to take such ac- es to sale under suspi cious cir cumstances may be seised, toge ther with the horse, And deli vered to a constable who is to bring the parties be fore justice, Who may examine witnesses and com mit. Persons lending pla ces for slaughter ing cattle, if not licens ed, are lia ble to a pe nalty, Or impri sonment.

By s. 6. every inspector may, at all times, in the day or night, but if in the night, then in the presence of a constable, enter into and inspect any place kept for slaughtering horses by any person so licensed; and also any stable, building, shed, yard, or place belonging thereto, and then and there examine and see if any horse, &c. as in s. 1. is deposited or brought there, and take an account thereof; and all persons so licensed, shall suffer such inspector at all times in the day and night, but if in the night, then in the presence of a constable, to enter into and inspect such place, and also any stable, &c. and freely soring hors to examine and see any horse, &c. then and there being, and to take such account as in s. 3.

By s. 7. in case any person who shall offer to sale, or bring any horse, &c. to any person keeping such slaughtering-house, to be slaughtered, or being dead, to be flayed, shall not be able, or shall refuse to give a satisfactory account of himself, or of the means by which the same came into his possession; or if there be reason to suspect that such horse, &c. as in s. 1. is stolen or unlawfully obtained, the person keeping such slaughtering-house, to whom the same shall be brought or offered to sale, and his servants, and also such inspector or his servants, may seize such person, and also every such horse, &c., so brought or offered to sale, and deliver such person into the custody of a constable or peace-officer, who shall convey him before a justice for the county; and if such justice shall, upon examination, have cause to suspect that such horse, &c. is stolen or unlawfully obtained, such justice may commit such person into safe custody for not exceeding six days, in order to be further examined; and if upon either of the examinations, such justice shall be satisfied that such horse, &c. is stolen, or illegally obtained, he may commit the person bringing the same to sale, to the common gaol or house of correction, there to be dealt with according to law.

By s. 8. if any person keeping such slaughtering-house, shall slaughter any horse as in s. 1. for any other purpose than for butcher's meat, or shall flay any horse, &c. brought dead to such slaughtering-house, without taking out such licence, as in s. 1. or without giving such notice as in s. 3 or shall slaughter or flay the same at any time other than within the hours in s. 3. limited, or shall not delay slaughtering according to the direction of such inspector, as in s. 5. such person shall be guilty of felony. and shall be punished by fine and imprisonment, and such corporal punishment, by public or private whipping or shall be transported for not exceeding seven years, as the Court may direct.

By s. 9. if any person keeping such slaughtreing-house, shall throw into a lime-pit, or otherwise immerse in lime, or any preparation thereof, or rub therewith, or with any other corrosive matter, or destroy or bury the hide or skin of any horse, &c. by him slaughtered or flayed, or shall be guilty of any offence against this act, for which no punishment or penalty is provided, such person shall be adjudged guilty of a misdemeanor, and shall be punished by fine and imprisonment, and such corporal punishment, by public or private whipping, as the Court shall direct.

By s. 10. if any person so licensed shall make a false entry in such book, of any matter required by him to be made in such book, as in s. 4. he being convicted thereof, upon the oath of two witnesses, before any justice, shall forfeit not exceeding 20*l.* nor less than 10*l.* to be levied by distress and sale of the goods of such offender, by warrant under the hand and seal of such justice, (the surplus, after deduction of the charges, to be restored) one moiety thereof to be paid to the informer, and the other to be forthwith paid by such justice, to the overseers of the poor, for the use of the poor where the offender shall reside; and in case such offender shall not have effects to the amount of the penalty, such justice after sale and application as aforesaid, of such effects as shall be found, may commit him to the house of correction, there to be confined to hard labour for not exceeding three months, nor less than one.

By s. 12 the book of the inspector shall be produced at every general quarter sessions, and delivered to the justices at such sessions, then and there to be examined by them as they fit.

By s. 13. If any person shall occasionally lend any horse, barn, stable, or other place, for slaughtering any horse, &c. which shall not be killed for butcher's meat, without taking out such licence, and shall be convicted thereof before any justice, upon the oath of two witnesses, he shall forfeit not exceeding 20*l.* nor less than 10*l.* one moiety thereof to be paid to the informer, and the other to the poor of the parish where the offence shall be committed; and which last moiety shall, upon payment thereof, be immediately transmitted by the justice to the overseers of such parish; and in case such penalty shall not be forthwith paid, such justice shall commit the offender to the common gaol or house of correction, for not exceeding three calendar months, nor less than one unless the penalty be sooner paid, he will be convicted.

By s. 14. this act shall not extend to any carrier, felt-maker, tanner, or dealer in hides, who shall kill any distempered or aged horse, &c. as in s. 1. or purchase any dead horse, &c. for the *bona fide* purpose of selling, using, or curing the hides thereof, in the course of their trades, nor to any farrier employed to kill aged and distempered cattle, nor to any person who shall kill any horse, &c. of their own or other cattle, or purchasing any dead horse, or other cattle, to feed their own hounds or dogs, or giving away the flesh thereof for the like purpose.

By s. 15. if any collar-maker, carrier, felt-maker, tanner, or dealer in hides, or farrier, or other person, shall, under colour of their trades, knowingly kill any sound horse, or boil or cure the flesh thereof, for the purpose of selling the same, such collar-maker, and other tradesmen, shall be deemed an offender within this act, and shall, for such offence, forfeit not exceeding 20*l.* nor less than 10*l.*

By s. 16. any justice, before whom complaint is made for any offence against this act, may summon any person, other than the party complained against, to appear before him to give evidence; and in case such person shall wilfully refuse or neglect to attend or give evidence, he shall forfeit 10*l.* and in default of payment thereof, or in case of inability to pay the same, shall stand committed to the common gaol or house of correction, for not exceeding three calendar months, nor less than one, unless the penalty is sooner paid.

By s. 17. any inhabitant of the parish where any offence shall be committed, shall be a competent witness, notwithstanding his contributing to any of the rates to such parish; or being a poor person relievable by the parish, and entitled as such to receive any benefit from any penalty to be paid in pursuance of this act.

Persons by
burying
horseflesh,
&c. are sub-
ject to im-
prison-
ment.

Penalties
and proceed-
ings under
the act.

The inspec-
tor's book
is subject to
the sessions
superinten-
dance.

[208]
Distribu-
tion of the
penalties
under this
act.

This sta-
tute

does not ex-
tend to tan-
ners, &c.

Unless they
knowingly
kill sound
cattle for
the purpose
of having
the skins,
and then
they are lia-
ble to a pe-
nalty.

The justi-
ces of the
peace must
proceed by
summons.

Inhabitants
of a parish
are compe-
tent witness-
es.

The parties
sued may
plead the
general is
sue.

[209]

Persons
who ill
treat

Animals
are to be
brought be
fore a jus
tice;

Who shall
examine
witnesses,

And inflict
a penalty,

Provided
the prose
cution be
commenc
ed within
10 days.

No proces
ding shall
be quashed
for any in
formality,

And if a
complaint
be impro
perly insti
tuted, the
complain
ant shall
make a
compensa
tion.

Sec 6. re
gulates the
proceed
ings by ac
tion.

[210]

By s. 18. persons sued for any thing under this act, may plead the general issue, and give the special matter in evidence; and if defendant gets a verdict, or the plaintiff is nonsuited, such defendant shall have treble costs.

VII. OF THE STATUTES TO PREVENT CRUEL AND IMPROPER TREATMENT OF CATTLE.

By the 21 Geo. 3. c. 67. several regulations were made for the prevention of cruelties to cattle. And by the 3 Geo. 4. c. 71. s. 1 it is enacted, that if any person shall wantonly and cruelly beat, abuse or ill-treat any horse, mare, gelding, mule, ass, ox, cow, heifer, steer, sheep, or other cattle, and complaint on oath thereof be made to any justice of the peace or other magistrate, within whose jurisdiction such offence shall be committed, it shall be lawful for such justice or magistrate to issue his summons or warrant at his discretion, to bring the party complained of before him, or any justice or magistrate of the county, city, or place, within which such justice or magistrate has jurisdiction who shall examine on oath any witness or witnesses, who shall appear to give information touching such offence (which oath such justice or magistrate may administer); and if the party accused shall be convicted of such offence, either on confession, or upon such information as aforesaid, he shall forfeit not exceeding 5*l.*, nor less than 10*s.* to his majesty; and if the party convicted shall refuse, or shall not be able forthwith to pay the sum forfeited, he shall, by warrant under the hand and seal of such justice or magistrate. within whose jurisdiction the person offending is convicted, be committed to the house of correction, or some other prison within the jurisdiction within which the offence was committed, there to be kept without bail, for a period not exceeding three months.

By section 2. provided that no person shall suffer any punishment for any offence against this act, unless the prosecution be commenced within ten days after the offence committed, and when any person shall suffer imprisonment pursuant to this act in default of paying the penalty, such person shall not be liable afterwards to any such penalty. By section 3. provided also that no order or proceedings to be made or had by or before any justice or magistrate by virtue of this act, shall be quashed or vacated for want of form; and that the order of such justice or magistrate shall be final; and that no proceedings of such justice or magistrate shall be removable by *certiorari* or otherwise. Section 4. gives the form of the conviction. Section 5. If, on hearing any such complaint, the justice or magistrate who shall hear the same, shall be of opinion that such complaint was frivolous or vexatious, then it shall be lawful for such justice or magistrate to order the person making such complaint, to pay to the party complained of, any sum not exceeding 20*s.* as a compensation for the trouble such party was put to; such order to be final between the said parties, and the sum thereby ordered to be paid and levied in manner as before provided for enforcing payment of the sums to be forfeited by the persons convicted of any offence against this act. Section 6. If any action or suit shall be brought or commenced against any person for any thing done in pursuance of this act, it shall be brought or commenced within six calendar months next after every such cause of action named, and shall be brought, laid, and tried in the county, city, or place, in which such offence was committed, and not elsewhere; and the defendant in such action may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereon, and that the same was done under the authority of this act: and if it shall so appear, or if any such action shall not be commenced within the time limited or shall be laid in any other county or place than where the offence was committed, then the jury shall find for the defendant; or if the plaintiff shall become nonsuited or discontinue his action, or if judgment shall be given for the defendant therein, then such defendant shall have treble costs, with the usual remedy to recover the same.

Caveat.

A caveat is a process in the *Spiritual Court*, prohibiting the institution of a clerk to a benefice, or probate of a will, administrations, licences, dispensa-

Writs, faculties, institutions, &c. from being granted. And when a caveat is entered against an institution, administration, or the like, if the bishop institutes a clerk, or administration be granted, it is void; but by the common law, an admission, institution, probate, or the like, granted contrary to a caveat, shall stand good, because the Temporal Courts merely view a caveat as a caution, like the caveat entered in Chancery against the passing of a patent, or in the common pleas against the levying of a fine. See 2 Bac. Abr. 404; Gibs. 778; Ayl. Par. 145. 146; 1 Vernon. 119; 1 Lev. 157; Owen. 50.

Cause. See tit. *Trial*.

Cause of Demurrer. See tit. *Demurrer*.

Cemetery. See tit. *Monument*.

Centenarius.

A petty judge, under-sheriff of counties, that had rule of a hundred, and judged smaller matters among them: see 1 Vent. 211.

Cepit Corpus. See tit. *Capias ad Satisfaciendum*.

Cepit in Alio Loco. See tit. *Replevin*.

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CERTIFICATE.

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I. NATURE AND UTILITY OF IN GENERAL.

A writ of *certiorari* is an original writ issuing out of the Court of Chancery, or the King's Bench, or Common Pleas, directed in the king's name to inferior judges or officers, commanding them to certify, or to return the records of a case depending before them, to the end that the party may have the more sure and speedy justice before the king, or such justices as he shall assign to determine the cause; 1 Bac. Ab. 349; F. N. B. 245; Com Dig. tit. *certiorari*. When it issues out of Chancery, it is returnable in that court, and the record when brought up, if required in any other court, must be sent there by *mitimus*; Tidd. Prac. 400. 7th edit.

II WHEN IT LIES.

(A) IN GENERAL.*

1. REX v. BASS. E. T. 1793. K. B. 5 T. R. 252; S. C. Nol. Rep. 227. S. P. *Ex parte* COMMISSIONER OF SEWERS. M. T. 1726. K. B. 1 Stra. 609. S. P. LAMPRIERE'S CASE. H. T. 1669. K. B. 1 Mod. 41; S. C. 1 Vent. 63.

It is discretionary with the Court, on the defendant's application for a *certiorari*, to grant or refuse the writ; [115]

The defendant had been convicted upon an information before justices, for the penalty and forfeiture of spirituous liquors, in consequence of his having brought the same into an entered cellar used for keeping distilled liquids, without first producing to and leaving with, the officer of excise of the division or place where the cellar was situated, an authentic certificate, pursuant to 9 Geo. 2 c. 23. s. 7. A *certiorari* was moved for upon the following grounds: 1st. That these spirits were brought in on the 21st of June, and the information was laid on the 15th of September, which is two days beyond the time allowed, the stat. 1 W. & M. sess. 1 c. 24. s. 16. requiring that the information should be laid and entered "within three months after every such offence committed;" and, 2d, that it was given in evidence, that on the 21st of June the defendant had obtained a permit for 64 gallons, and, therefore, the justices should only have convicted him in the forfeiture of 12 gallons, being the excess of the contents of the cask above the quantity covered by the permit. But the court said: a *certiorari* is not to be granted *ex debito justitiæ*; but the application is made to the sound discretion of the court, which will not be well exercised, if we do not give an opportunity to the party applying for the writ to litigate any probable cause; but a probable ground must exist. If it had appeared that the justices had exceeded their jurisdiction, the court would have granted a *certiorari*, in order that the conviction might be quashed, even though no objection were made to the want of jurisdiction below.—Rule discharged.

2. REX v. THE JUSTICES OF THE HUNDRED OF CASHIOBURY. 3 D. & R. 35 S. P. REX v. JUKES. E. T. 1800. K. B. 8 T. R. 542. S. P. REX v. FLOWRIGHT. H. T. 1685. K. B. 3 Mod. 95; S. C. 2 Show. 458.

The court, referring generally to penal statutes, observed, that this was the governing principle with respect to the writ of *certiorari*; viz. that the writ universally lies, unless it is expressly taken away by the words used in the enactment. See 5 T. R. 338.

3. REX v. LEDIARD. M. T. 1751. K. B. Sayer. 6. S. P. REX v. LLOYD. T.

* A *certiorari* lies to remove all judicial proceedings in which no writ of error lies, at the instance of the prosecutor or plaintiff; see 1 Ld. Raym. 467; 2 Hawk. P. C. c. 27, s. 28. But it is in the discretion of the court, either to grant or deny it at the prayer of the defendant; see 2 Doug. 749; 2 T. R. 89; 4 Burr. 2456; 2 Hawk. P. C. 227; s. 27; and *post*, div. V. To whom it lies.

Unless the right to such writ be expressly tak

on away by
statute.*

T. 1783. K. B. Cald 309. S. P. THE CASE OF MAYO AND PARSONS. M.
T. 1722. K. B. 1 Stra. 391.

It only lies
to remove
judicial
and not mi-
nisterial
acts.

In obedience to a *certiorari* for returning a conviction concerning the forfeiture of a horse, the defendant returned that information being made to him upon oath by, &c. that they had seized a horse, because he was drawing in a carriage where there was more than five horses, and had delivered him pursuant to the direction of the statute to a constable; he had issued a warrant, by which the constable was commanded to re-deliver the horse, &c. Upon this return it was holden, that the *certiorari* should be quashed; Lee, C. J. observing—there is, in this case, no conviction. It is essential to a conviction, that it be founded upon a proceeding against a person; but in the present case, the proceeding was against a thing. It is likewise essential to a conviction, that it be a *judicial act*; but the issuing of a warrant in this case was a *ministerial act*, which the defendant was required by the statute giving the forfeiture to do. A *certiorari* does not lie for removing a warrant of the justice of the peace, the

[216] remedy for the party injured being by action.

4. MEREDITH V. DAVIES. E. T. 1711. K. B. 1 Salk. 270.

But it may
be obtained
to supply a
defect in
the body of
the record.

On a writ of error brought on a judgment given for the plaintiff in ejectment in the grand session of Wales, after verdict, the general errors were assigned, and in *nullo est erratum* pleaded. On arguing of the case, it appeared that the declaration set forth a demise for a term of years to the plaintiff; but it did not show that the plaintiff entered, or was possessed, and the truth was that this line was omitted in the transcript, and the court held this defect to be fatal. Whereon the plaintiff prayed the court would award a *certiorari* to the grand sessions. It was argued it could not be done, for that the party had estopped himself by pleading no error; and though the court might do it in order to be certified of the out-branches of the record, as in the original writ, or warrant of attorney, which are not returned with the body of the record on a writ of error, and which indeed are contained in another roll; yet the court could never do it, to be certified of any thing in the body of the record, they must suppose it to be returned as it ought to be, and must take it as it is, and are concluded by the admission of the parties from taking it to be otherwise; 1 Roll. Abr. 264; 2 Cro. 6; 9 Ed. 4. 32. On the other side, it was insisted, that by pleading no error, the defendant admitted the record perfect; for the effect of his plea is, that this record, as it is, is without error; therefore he cannot come and allege diminution afresh, and say, that there is error by reason of such a defect, for that is against his former supposal; and by the same reason he might be let in to allege a diminution more than once, and he may allege it *ad infinitum*; that the party is, therefore, bound and foreclosed by this admission, and that equally as to all parts of the record; but the court was not foreclosed, for the writ of error is a commission to them to examine the error, viz. that by inspecting the record and process, the court may cause to be done that which in justice ought to have been done. Therefore no admission of the parties can or ought to restrain the court from looking into the record before them; that in the case of Carlton v. Mortagh, the plaintiff assigned for error the want of an original, and the defendant pleaded a release, but mispleaded it; and though this was a full confession of the party, that there was no original, yet the court awarded a *certiorari*, and affirmed the judgment; but that had been otherwise if he had assigned for error, infancy; because this could not appear by inspecting that record; and that wherever by inspecting the record the court may affirm the judgment, they ought to award a *certiorari*. And as the party, by pleading no error, is estopped to pray *certiorari* as to every part of the record, so the court is foreclosed as to no part; and the cases of Gwynn, 1 Keb. 55; and of Fanshaw v. Morrison, Trinity 3 Ann; 5 Mod. 290; in this court a *scire facias*, on a recognizance against bail, are in point; and the court granted a rule for a *certiorari*.

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5. REX. v. ——— H. T. 1816. K. B. 2 Chit. Rep. 137.

* As to the effect of statutes restraining the Courts from granting a *certiorari*, see post, div. IV.

The Court granted a *certiorari* to bring up a conviction for selling with another, instead of the Winchester bushel, on the ground that the magistrate had rejected the vendee as a witness to prove that the defendant used the Winchester bushel.

ground that a witness who could have disproved the fact of defendant's guilt was rejected. on the

6. *REX V. MATTHEWS* E. T. 1815 K. B. 1. Chit. Rep. 571. n.

Motion for a *certiorari* to remove an indictment, on the ground of prejudice against the defendant. Per Lord Ellenborough, C. J. The rule must be refused. It is not a sufficient ground for the issuing of a *certiorari*, that prejudices existed against the defendant, unless it be stated that some prejudice existed in the court below.

7. *REX V. MEAD*, T. T. 1827. K. B. 3 D. & R. 301. S. P. *REX V. FAWLE*.

M. T. 1728. K. B. 2 Lord Raym. 1452

A rule nisi had been obtained for a *certiorari* to remove the indictment of murder from Yorkshire, in order to have it tried at bar, or in another county, on the ground that the prisoner could not have a fair and impartial trial. It appeared that the parties had been indicted at the spring assizes, but that after a plea of not guilty, and issue thereon, a motion had been made to postpone the trial on the ground, which it was now urged, authorized the Court to grant a *certiorari*. It was shown that certain statements had appeared in different newspapers tending to excite a prejudice against the prisoner; but all these publications had taken place before and during the last assizes.

Per Cur. Several objections present themselves to our granting the writ. If we should make the rule absolute, one effect of it must be, delay in the administration of justice. Another probable consequence of it will be, if a trial is granted in another county, or at the bar of this court, that those who have instituted this prosecution, will through want of means, be obliged to abandon it. We must also bear in mind, that the prisoner might have applied to us at a much earlier period, with a much more reasonable probability of success. This is the state of things on the one hand; and on the other, if we refrain from granting this writ, there is a possibility of the trial of the prisoner being not affected by the publications which have been sent forth to the world. We may here confidently hope, that in a serious case of this kind, the jury will guard themselves against acting upon preconceived impressions. The balance of considerations induces us, therefore, to discharge the rule. See 3 B. & A. 444; 4 M. & S. 442; 1 Str. 549; 2 id. 877; Cro. Car. 252. 264. 291; 2 Hale. 212; 8 Mod. 135; 21 Vin. Abr. 177; 2 Str. 1049. 1165; 2 Lord Raym. 1452. 2 Stra. 1068; 3 Burr. 1330; 2 Stra. 874; 1 T. R. 363.

8. *DANIEL V. PHILLIPS*. H. T. 1792. K. B. 4 T. R. 499.

It was moved to quash a *certiorari*, issued to remove a cause from the borough court of C., on the ground that the damages were laid in the action under 40s. and therefore the court of K. B. had no jurisdiction; to which it was replied and resolved by the court, that however that objection might have been obtained in general, yet it did not apply to this case, being an action for assault against excise officers, who could not have an impartial trial in the court below. See *Patterson v. Eades*, 3 B. & C. 550; S. C. 5 D. & R. 445. unless it be on the ground that the party cannot obtain an impartial trial.

9. *REX V. THE JUSTICES OF SOMERSETSHIRE*. E. T. 1822. K. B.

1 D. & R. 443.

A motion was made for a writ of *certiorari* to remove into this court the appointment by two justices of certain overseers of a parish, in order that it might be quashed, on a suggestion that the justices made the appointment from corrupt and improper motives. *Per Cur.* We must refuse the rule. If the magistrates have acted corruptly in appointing persons who ought not to be overseers, that may be the foundation of a motion for a criminal information against them, if the corrupt motive can be satisfactorily made out; but otherwise the most usual and proper remedy is by appeal to the sessions.—Rule refused. See 2 East. 244; 2 M. & S. 322; Comp. 139; 4 M. & S. 378.

10. *REX V. HARRISON*. T. T. 1819. K. B. 1 Chit. Rep. 571.

And a *certiorari* was granted to remove a conviction

on the ground that a witness who could have disproved the fact of defendant's guilt was rejected.

But mere prejudice existing against the defendant is not enough to entitle him to a *certiorari*, unless it exist in the low.

The Court therefore refused a *certiorari* to remove an indictment in order to have a trial at another county, on the ground that a fair trial could not be had where parties came late with the application, and delay of justice might ensue.

[218] So a *certiorari* will not lie to remove a cause where the damages are laid under 40s.,

And the mere impropriety of the appointment of overseers is not a ground for removing it by *certiorari*, in order that it may be quashed.

So a defen

Indictment at the sessions. Motion for a *certiorari* on behalf of the defendant, to remove the proceedings, upon an affidavit that the proceeding was unusual, and that he was advised that several matters of law of the greatest importance would arise upon the trial. *Per Cur.* A stronger affidavit must be produced. If it can, the motion may be removed at chambers. At present, we must refuse the rule.

11. *PATERSON V. REAY*. M. T. 1822. K. B. 2 D. R. 177.

A motion was made for a *certiorari* to bring up the proceedings against the defendant, from the court of the county palatine of Durham, because the defendant was then in the custody of the *marshal* for debt, in order that the bail below might render him, and be discharged. *Sed per Cur.* There is not a precedent to be found to warrant the present application. The bail below enter into certain recognizances; and shall we deprive the plaintiff of his remedy against them, if they fulfil not the condition of their recognizance. The statute 19 Geo. 3 c. 70, which has been referred to, was made for the relief of plaintiffs, and not of defendants; and we cannot permit the defendant as the bail to remove the record, without the consent of the plaintiff.—Rule refused.

an inferior court in order that the bail below may render the defendant who happens to be in the custody of the marshal.

B IN PARTICULAR CASES. 1st. OF ACTIONS.

1. *DOE, dem. SADLER V. DRING*. H. T. 1827. K. B. 1 B. & C. 243; S. C. 2 D. & R. 407.

It was urged that a *certiorari* would not lie to remove an ejectment from an inferior court, and that the proper course was to sue out a writ of *habeas corpus cum causa*.

Per Cur. There seems to be no reason why this writ should not be as applicable to this form of action, as to any other. It is, besides, a most beneficial writ for the parties, much more so than a *habeas corpus*, for by the latter, the plaintiff is only removed, whereas by the former all proceedings are brought up from the inferior court. See 1 Salk. 148; 2 Lord Raym. 836. 345; 3 M. & S. 326; Gilbert's Ejectment, 37; Cro. Car. 82. 8; 1 Sid. 231; Bac. Abr. tit. Ejectment; Skin. 244; Barnes. 421; Adam's Ejectm. 177.

2. *SMITH V. THE MAYOR OF LONDON*. M. T. 1703. K. B. 6 Mod. Rep. 78. The Court said, that a foreign attachment could not be removed by *certiorari*, because they could not proceed according to the custom of London. See 1 Tidd. 401. 7th edit. contra, cited 1 Salk. 148; 2 Ld. Raym. 837; 7 Mod. 138.

2d. OF PRISONERS.

1. By 1 & 2 P. & M. c. 13. no writ *certiorari* can be granted to remove any prisoner, unless signed with the proper hand of the Chief Justice; or if he be absent, of one of the judges of the court, from which it is awarded; see also 1 Tidd. Prac. 404. 7th edit.

2. *LAMPRIERE'S CASE*. H. T. 1669. K. B. 1 Vent. 63.

On motion for a *certiorari* to remove T. from the gaol of Bedford, who had been committed for robbery, the Court refused the writ, observing, that it could not be granted before indictment found.

3d. OF RATES AND ASSESSMENTS.

1. *REX V. THE INHABITANTS OF UTOXETER*. E. T. 1733. K. B. 2 Stra. 932. S. P. *REX V. THE JUSTICES OF SHREWSBURY*. E. T. 1735. K. B. 2 Stra. 975.

On great debate, and search of precedents, it was held that a *certiorari* would not lie to remove the poor's rate itself, the remedy being to appeal, or by action when a distress is taken, which will answer all the ends of justice in ascertaining an unequal rate; whereas, if the rate itself should be required to be sent up, great inconveniences and delay would follow; and a case was cited; Mich. 10 Anne, the Queen v. the inhabitants of St. Mary the Virgin, in Marlborough, where it was so resolved. See 2 Kel. 117. pl. 97; Barnard, K. B. 443; Sess. Ca. 150.

* Although a lense may have been executed and sealed on the premises, locally situate within the jurisdiction; *Patterson v. Eades*, 3 B. & C. 650; S. C. 5 D. & R. 445; overruling the distinction in 2 Sellon's Pr. 138.

2. REX v. KING. H. T. 1788. K. B. 2 T. R. 234.

A *certiorari* had been applied for to remove all and singular the assessments of land-tax for the Tower division of London for a particular year; but the Court refused the writ, saying, the assessments of the land-tax were public proceedings; every person was entitled to take copies, so that no injury could arise to the party from the Court refusing a *certiorari*; but, on the contrary, very great public inconvenience would ensue from permitting it to issue; though, they said, if an application were made to the court for an information, they would admit an attested copy instead of the original.

So a *certiorari* will not lie to remove assessments made by the commissioners of land tax.

It is doubtful whether a *certiorari* lies to remove an order of sessions, continuing a soldier in custody for being the father of a bastard.

4th. OF ORDERS. (a) Of bastardy.

REX v. BOWEN. H. T. 1793. K. R. 5 T. R. 156; S. C. Nol. Rep. 186.

In this case the Court doubted, whether they would grant a *certiorari* to remove an order of sessions, by which a soldier was continued in custody, for want of sureties, under the 6 Geo. 2. c. 31. for being the father of a child likely to be born a bastard.

(b) Concerning the repairs of bridges.

REX v. ———. T. T. 1690. K. B. 1 Com. 86.

On motion for a *certiorari* to remove an order made by the justices of peace, concerning the repair of a bridge and wear, pursuant to a private act of parliament, the Court made the rule for the writ absolute.

(c) On a conventual act.

REX v. MORLEY. M. T. 1704. K. B. 1. Bl. Rep. 231; S. C. 2 Burr. 1040.

On a rule to show cause why a writ of *certiorari* should not issue to remove several orders made by a justice of peace, on the Conventicle Act, 22. Car. 2. c. 1. by which orders the said justice had convicted a methodist preacher, and several others, in different penalties, under the said statute; the Court said—we are clearly of opinion that a *certiorari* ought to issue. A *certiorari* does not go to try the merits of the question, but to see whether the limited jurisdiction have exceeded their bounds. The jurisdiction of this court is not taken away unless there be express words in the statute to take it away. This is a settled point; therefore a *certiorari* ought to issue, and after a return shall be made, the parties will be at liberty, and it will be open to them to move for a *supersedeas*, if there should appear sufficient reason to the Court for so doing; therefore, let the rule be made absolute for a *certiorari*.

A *certiorari* lies to remove an order concerning the repairs of a bridge.

A *certiorari* lies to remove an order on the conventual act.

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A *certiorari* may be obtained to remove an order direct or indirect surveyors of highways to pass their accounts, &c.

(d) For not passing surveyors of highways' accounts.

REX v. THE JUSTICES OF DERBY. E. T. 1758. K. B. 2 Kenyon. 299.

Upon motion to remove an order made at the quarter sessions, upon some persons, who a few years were surveyors of the highways, to pass their accounts, and pay the balance over, &c. the 3 and 4 W. & M. were relied on, which says, no *certiorari* shall issue to remove any order made under that act. But on its being urged, that the order in this case was out of the jurisdiction of the justices, and therefore might be removed by *certiorari*, the Court granted a rule to show cause.

(e) By commissioners of sewers.

1. THE DUCHESS OF PORTLAND v. WYNNE. M. T. 1741. K. B. 7 Mod. Rep. 385.

P. laid out a considerable sum in repairing sea-banks which lay between her and one W. whose estates adjoined. and then obtained an order from the commissioners of sewers to charge W. with his contributory share. W. applied for a *certiorari* to the commissioners to remove all orders relating to the repair of all sea-banks between P. and himself, and also to the repairing of the east and west marsh-banks, upon an affidavit that all the said sea-banks were in repair. On a rule to show cause, P. produced an affidavit that the embankings of the east and west marsh sea-banks were not in good repair. The Court said; we cannot make this rule absolute; for, suppose the commissioners, on this general rule, had returned only the orders between P. and W., and had omitted certifying the orders relating to the east and west marsh sea-banks, they would have been in contempt. But if this rule be withdrawn, we will have no objection to grant a *certiorari* to remove the orders between P. and W. as regards the contribution.

A *certiorari* lies to remove orders made by commissioners of sewers, directing a sum to be paid from one individual to another as a contribution.

So it lies to remove an order of commissioners of sewers for dismissing their clerk. 2. **ARTHUR'S CASE.** M. T. 1726. K. B. 8 Mod. Rep. 331.; S. C. *Fortescux*. 374; S. C. *Stra* 609.

The plaintiff was chosen clerk to the commissioners of sewers, at a meeting, by a majority of 43 then present, and afterwards, at a second meeting, they made an order for his discharge, and chose another. On motion for a *certiorari* to remove the order, the commissioners opposed it, and offered to read affidavits that the plaintiff had been surreptitiously chosen, without due notice given to the majority of the commissioners. To which it was replied, and resolved by the Court, that they could not inquire into the merits of the election until the *certiorari* was granted and returned, and the rule for a *certiorari* was made absolute.

A *certiorari* does not lie to remove an order on quakers, for the nonpayment of tithes,* when questions concerning the title to the tithes are not raised.

(f) *For not paying small tithes.*

REX v. WAKEFIELD. H. T. 1737. K. B. 1 Pur. 485; S. C. 2 Kenyon. 164.

An order of two justices made on several Quakers, for payment of tithes, being removed into this court by *certiorari* it was objected that no *certiorari* could issue by the express provision of the act, because the title was not in question, the parties merely objecting to pay on account of their scruples.

Per Cur. We are all clearly of opinion, that the rule for the *certiorari* having been made absolute, and the return thereto having been filed, ought not now to stand in the way, and prevent our coming at the real justice and merits of the case; for if the *certiorari* issued *improvidē*, we can order it to be superseded, and the return to be taken off the file; and we do therefore order, that the writ of *certiorari* be superseded: the return taken off the file, and the order remanded.

5th. OF PRESENTMENTS.

REX v. ROUFELL. T. T. 1776. K. B. Cowp. 458.

A *certiorari* lies to remove a presentment at a court-leet for a nuisance.

A rule had been obtained to show cause why a *certiorari* should not issue to remove a presentment against the defendant, in the court-leet of the Savoy, for keeping a disorderly house, in which he had been amerced 50*l.* After cause shown, the rule was made absolute: the Court observing: we are clear, that a *certiorari* ought to go: the presentment cannot be traversed at the leet but the proper method is to grant a *certiorari*, that it may be traversed here. There are many authorities which say a presentment may either be traversed by being removed into the King's Bench, or in an action. It cannot be true, that it is not traversable anywhere. The defendant has never been heard at all; and it would not be just that he should be condemned and fined unheard; and, as he cannot traverse the presentment at the leet, he ought to have a *certiorari* to remove it, in order to traverse it here. There is another reason for granting a *certiorari*; that the defendant might have an opportunity of taking exceptions to the presentment itself, in point of form or otherwise. In *Dyer*. 13. pl. 64. Fitzherbert said, that Briton, who is a good authority, said, that every presentment is traversable which is presented in a leet; and also in the sheriff's tourne, out of which leets were at first derived, which is taken notice of in *Mathews v. Carey*, 3 Mod. 137. In *Finch*. 386. 8vo. edit. it is said, the course is to remove such presentments into the King's Bench by *certiorari*, where the party may traverse them. To say that the defendant should have no opportunity of being heard, would give a court leet a power superior to that of any other jurisdiction in the kingdom: therefore what is said in 2 Hawk. 71, namely, that it is not traversable any where, is a mistake; it is not traversable in the court-leet, but it is traversable when removed hither; and that is the reason why a *certiorari* ought to go.

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A *certiorari* lies to remove an information at the sessions for exercising a trade without having served an apprenticeship.

6th. OF INFORMATIONS.

FARREN v. WILLIAMS. H. T. 1776. K. B. Cowp. 369.

On an information *quidam* on the 5 Eliz. c. 4. brought in the quarter session in London, against the defendant for exercising the trade of a tallow chandler not having served seven years' apprenticeship, the Court granted a *certiorari* to remove the proceedings into this court.

* Nor against any other person unless the title to the tithe comes in question; see 7 & 8 W. 3. c. 6.

7th. OF INDICTMENTS.

(a) For keeping bawdy-houses.

REX V. DAVIES. E. T. 1794. K. B. 5 T. R. 626.

An indictment was found at the assizes against the defendant for keeping a So to re
disorderly house, and on an application by the prosecutor there, it was ordered move an in
that 48 hours notice of bail should be given before bail could be taken; the dictment
defendant complied with the order, and put in bail below. It was argued a- for keeping
mong other things, on an application for a *certiorari*, that the granting the writ a disorderly
was in the discretion of the Court, and that, therefore, after the prosecutor had house, even
compelled the defendant to incur an expense below, they would not permit has been
him to remove the indictment into this court; but the Court said, though per- put in be-
haps the prosecutor would have acted more discreetly by suffering the indict- low.
ment to remain in the court where it was found, they could not say, from any
authority, that he had precluded himself from removing the record by any step
which he took below, for that would equally apply to all prosecutions where
bail had been put in below.

(b) For not repairing a bridge.

1. **REX V. THE INHABITANTS OF HAMWORTH.** E. T. 1732. K. B. 2 Stra. 900. Formerly a

On motion to quash a *certiorari* to remove an indictment against the defend- was only
ant for not repairing a bridge, it was insisted that by 1 Ann. c. 18. the *certio-* available to
rari was taken away. To which it was answered and resolved by the Court, remove an
that this act extended only to bridges the county is charged to repair, and that indictment
where a private person or parish is charged, and the right will come in ques- for not re-
tion, the 5 and 6 W. & M. c. 11. had allowed the granting a *certiorari*; there- pairing a
fore they refused to quash the writ. bridge

2. **REX V. THE INHABITANTS OF CUMBERLAND.** H. T. 1795. K. B. 6 T. R. 194. against pri-
194. vate indivi-
duals;

After verdict for the crown at the assizes, against the inhabitants of the
county of O. for not repairing and widening a bridge, a motion was made by [224]
the prosecutors. that a fine might be imposed on the defendants, when a ques- But now it
tion arose, whether or not an indictment of this kind could be removed by *cer-* also lies
tiorari, as this had been at the instance of the prosecutor? In order to show against a
that it could not, the defendants relied on the stat. 1 Ann. c. 18. s. 5. by which county.
it is enacted that "all matters concerning the repairing and mending of the
bridges and highways hereinbefore mentioned, shall be determined in the
county where they lie, and not elsewhere, and that no presentment, &c. for
not repairing, &c. shall be removed by *certiorari* out of the said county into any
other court." But the Court, upon the authority of a great number of cases A *certiora*
(chiefly MS) determined that the *certiorari* had been properly issued, and ri, lies to
therefore the rule imposing the fine was made absolute. remove an
indictment
charging de-
fendant as
a cheat.

(c) For cheating.

REX V. DIXON. M. T. 1703. K. B. 3 Salk. 78; S. O. 2 Lord Raym. 971.

The defendant was indicted for selling five yards of muslin, affirming it to
be worth 5s. per yard, whereas it was not worth 2s. 6d. per yard; upon not
guilty pleaded, the defendant was found guilty, and the Court granted a *certio-*
rari to remove this indictment.

(d) For deer-stealing.

REX V. EATON. M. T. 1787. K. B. 2 T. R. 89.

Upon a motion for *certiorari* to remove a conviction upon the 16 Geo. 3. c. 30. passed to prevent deer-stealing, it was objected that no conviction or judg- Under the
ment should be removed by *certiorari*. But the Court said—the result of the 16 Geo. 3.
several provisions in the statute passed to prevent deer-stealing, is, that the de- relating to
fendant has an option either to remove the conviction by *certiorari*, or appeal deer-steal-
to the sessions; by adopting one, he renounces the other. ing, the de-
fendant has
an option ei-
ther to re-
move the
conviction
by *certiora*
ri or ap-
peal to the
sessions.

(e) For obtaining money under false pretences.

1. **REX V. SMITH.** H. T. 1774. K. B. Cowp. 24.

On motion for a *certiorari* to remove an indictment on the 30 Geo. 3. c. 24. An indict-
for obtaining goods under false pretences, so that the defendant might be more ment for ob-
effectually punished, the Court said, it would not lie. taining
goods,

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Or money
under
false pretences
cannot
be removed
by *certiorari*.

Certiorari
to remove
an indictment
for
forgery denied,
though the
defendant had
been punished
by fine for the
same offence
the prosecutor
not consenting.

2. REX v. YOUNG. E. T. 1788. K. B. 2 T. R. 472.

A motion being made to remove an indictment on the 30 Geo. 2. c. 24. s. 1. which takes away a *certiorari*, did not relate to the preceding clauses of the statute, though it might to the 14th, and that a *certiorari* might be sustained on the 1st section if the defendant laid before the Court sufficient reasons to induce them in their discretion to grant it. But the Court said, from the words of the 20th section of the act, that "no *certiorari* shall be granted to remove any indictment, conviction, or other proceeding had thereon in pursuance of this act." and the case of the King v. Davis, Cowp. 24. it was clear that the preceding clause referred to the whole statute.

(f) *Forgery.*

REX v. ELFORD. M. T. 1732. K. B. 2 Stra. 877.

After a *mandamus* had been obtained under the seal of the court, the defendant (being an attorney) was dissatisfied with it, and altered it, before he delivered it to the party to whom it was directed. For this conduct an attachment had been granted; and on his submission and paying costs, he was discharged. He was afterwards indicted before the judges of assizes for a forgery, and moved for a *certiorari*, but the prosecutor not consenting, the Court refused to grant it.

(g) *Not repairing a highway.*

REX v. THE INHABITANTS OF TAUNTON, SAINT MARY. H. T. 1815. K. B. 3.

M. & S. 465. S. P. REX v. GREENLAW. M. T. 1731. K. B. 2 Stra. 849.

An indictment
against a parish
for non-repair
of a highway
may be removed
by *certiorari*
though the
parish pleads
the general
issue only.

This was an indictment found at the quarter sessions against the inhabitants of the parish of Taunton St. Mary, for not repairing a highway which was removed by *certiorari* by the defendants upon an affidavit filed by them, stating that on the trial of the indictment, the question whether the parish were liable to repair, and the right to repair would come in issue. An objection was now taken to such *certiorari*, on the ground that it was not grantable in this case, because by stat. 22 car. 2. c. 12. s. 4. the removal of indictments for not repairing highways, is prohibited before traverse, and judgment given thereon; and the statute 5 W. & M. c. 11. s. 6. relaxes that prohibition in such cases only where the right and title to repair may come in question; but that that could not come in question in this case, because by pleading not guilty only, the parish had admitted their liability, as if they had meant to deny it, they should have pleaded specially, that others were bound to repair.

Per Cur. From the usual affidavit, we should think it sufficient to say that the defendant could not now insist; that this is a case in which the indictment ought not to have been removed. But there is another answer to any such objection, namely, that in every case of an indictment against a parish for not repairing a highway, although the general issue only be pleaded, the inquiry whether it be a public or private way, necessarily brings into question whether the parish be liable or not to repair; because if it be a public way the parish will be liable; if private, they will not. In this way it may be fairly said, upon the general issue, to be a question in which the right to repair may come in question.

(h) *Misdemeanors.*

If a defendant be convicted at the sessions on an indictment for a misdemeanor, and a *capias pro fine* be issued against him, he shall not have a *certiorari* before judgment, if the fine be less than 100 s. REX v. BETHEL. M. T. 1703. K. B. 6 Mod. Rep. 17; S. C. 2 Ld. Raym. 937; S. C. 1 Salk. 149; S. C. Sett. & Rem. 220; S. C. Holt. 157.

The defendant was convicted on an indictment for a misdemeanour before justices of the peace, and not being present no judgment could be given; but a *capias pro fine* was awarded; he then, by *certiorari*, removed the conviction. The Attorney-General moved for a *procedendo*; 1st, because a *certiorari* usually went to remove indictments, &c. before trial, but not to remove convictions; for the consequence of that would be mischievous—that this Court, which not having tried the cause, could not be fully apprized of its nature, should set the fine, which ought, by law, to bear some proportion to the enormity of the offence. On the other side it was urged, that it was common to remove convictions before judgment, and that in this case there could be no inconvenience

in point of setting the fine; for it being on statute 14 Car. 2. the fine is ascertained thereby; viz. a year's imprisonment. But the Court said—this writ issues every day to remove convictions on which a writ of error does not lie, and for that is the party's only remedy, and the reason, regularly, why convictions are removed by *certiorari*; but *certiorari*'s have also gone where a writ of error Court may would have lain, to remove a conviction, plead a pardon, or for some other special reason; and cited a case in Chief Justice Scrogg's time, where a *certiorari* issued out of this court to remove a conviction on an indictment before judges of assize, and the Court gave judgment. It was for words, and there a writ of error would have lain; for whatever a conviction is on an indictment, a writ of error will lie; and he said, the practice of the Crown office was, to remove judgments of attainder, &c. by *certiorari*, and afterwards bring a writ of error *coram vobis*, &c. And so it was in the case of Mr. Hambden, and several others; but here being no special reason in this case, let a *procedendo* go.

(i) *Murder*

A *certiorari* lies to remove an indictment for murder. See 1 Vent. 146; 1 Mod. 64; 2 Keb. 681; 8 Mod. 136.

(j) *Nuisances.*

REX V. FAREWELL. E. T. 1745. K. B. 2 Stra. 1209.

The prosecutor of an indictment, for a nuisance in the highway, took out a *certiorari*, and the defendant moved to quash it, there having been no affidavit made according to statute 5 W. & M. c. 11. nor any recognizance given according to that and former statutes of 13 & 14 Car. 2. c. 6; 22 Car. 2. c. 12; and 3 W. & M. c. 12. But the court, on considering these acts, held, that they related only to a *certiorari* applied for by defendants, and not to one for the king, as this was. And many precedents were shown of a *certiorari* for the prosecutor, taken out in the manner this was; and therefore the *certiorari* was allowed.

(k) *Disturbing religious houses.*

REX V. WADLEY. H. T. 1815. K. B. 4 M. & S. 508.

The offences created by the 52 Geo. 3. c. 155. s. 12. is disturbing a religious assembly; and it provides, that "the offender, upon proof before any justice of the peace, by two or more credible witnesses, shall find sureties to answer for such offence; and in default of such sureties shall be committed until the next general or quarter sessions; and, upon conviction of the said offence at the said general or quarter sessions, shall suffer the penalty of 40*l*. An indictment upon the above act had been found at the quarter sessions. The question which now arose was, whether it could be removed into this court by *certiorari* before trial. *Per Cur.* When a statute creating a new offence, directs that it shall be prosecuted in a particular inferior court, the proceedings in which happen to be according to the course of the common law, and which are not changed by the statute, such prosecution is removable into the Court of King's Bench, unless the jurisdiction of that court is taken away, not by inference from general expressions, but in express terms. But if the inferior court does, or is to proceed contrary to the forms of the common law, so that the course of the proceedings in the superior and inferior courts are different, the prosecution cannot be removed, since by prescribing the inferior court, the statute has directed that the offence shall be prosecuted in a particular form. Now, to remove would be prosecuting it in a manner different to that prescribed, for the superior courts have jurisdiction to proceed according to common law only. and not according to the forms of the inferior court. Now the proceedings at the sessions, and in the King's Bench, by indictment, are similar, and the statute has not prescribed a form different from the usual one, neither has it confined the prosecution to the sessions; therefore it may be clearly removed into the court of King's Bench before trial. The provision respecting the two witnesses does not relate to the *prosecution* but to the *apprehension* of the offender. Had it required two witnesses to convict him, this mode of proceeding being contrary to the common law, and therefore to the

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Certiorari lies to remove an indictment for a nuisance to a highway.

So to remove an indictment found at the quarter sessions, upon the statute 51 Geo. 3. c. 155. s. 12. for disturbing a religious assembly,

mode of proceeding in the court of King's Bench, the indictment could not have been removed before trial. See 5 T. R. 442; Cowp. 524; Cro. Jac. 178. 644; 2d & 3d Resolutions, W. Jones, 193; 3 Mod 94; 1 Bl. Rep. 231; 2 Burr. 1040; 3 T. R. 442; 1 Burr. 543; 2 id. 799.

8th. CONVICTIONS.

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A *certiorari* will not lie to remove a conviction by the commissioners for the double duties on beer.

(a) For not paying duties on beer.

THE KING v. WHITBREAD. M. T. 1781. K. B. 2 Doug. 548.

A rule had been obtained to show cause why a *certiorari* should not issue to remove a conviction by the commissioners of excise, for the double duties on beer. The rule was opposed on two grounds; 1st, it was contended, that a *certiorari* would not lie, in any case, to remove proceedings before the commissioners of excise; 2dly, that in this case there were not sufficient reason laid before the court to induce them to grant the *certiorari*, even if it would lie.

Per Cur. Although great industry has been employed in this case no authority has been produced to show that a *certiorari* lies to remove proceedings before commissioners of excise. We have, however, attentively looked into the statutes. The statute of 6 Geo. 1. c. 21. has a clause which seems to be very material; it is the 22d section. By the clause immediately preceding (s. 21.) a forfeiture of brandy, arrack, rum spirits, and strong waters, is created in certain cases; and in those cases, both appeal and *certiorari* are taken away. Then comes the section to which I refer, which inflicts a penalty on the removal of sweets without certificate; and enacts, that the sweets themselves, together with the casks in which they are contained, shall be forfeited, and liable to be seized by any officer of excise. It then goes on, and says, "that every seizure, and seizures, of such sweets, &c., and also every other forfeiture or forfeitures which, from and after, &c., shall or may be made by virtue or in pursuance of any act or acts whatsoever, relating to the duties of excise, or to any other duty or duties, under the management of the commissioners of excise, shall, and may be proceeded upon, heard, examined into, adjudged, and determined by the same ways and means, and in the same manner and form as is, and are herein and hereby prescribed, directed, or appointed to be done, upon seizure of brandy arrack, rum, spirits, or strong waters, not exceeding as aforesaid; and that such proceedings thereon shall not be liable to any appeal or appeals, or to be removed by *certiorari*; any thing in this present act contained, or any law, statute, or provision, to the contrary thereof notwithstanding." These words are, certainly, very comprehensive, and seem large enough to include the present case; but this is a forfeiture of double duty. In the information it is stated, that the said Whitbread hath forfeited double the value of the said rates and duties of excise; and the adjudication is, that he do forfeit. But, besides, that is the natural construction of the words of the clause itself; such construction is greatly corroborated by the statute of 1 Geo. 2. st. 2. c. 16. s. 3., which was made expressly for the purpose of obviating some doubts that had arisen upon the general penning of the act of 6 Geo. 1. This 3d section of 1 Geo. 2. c. 16., after mentioning the 22d section of the former statute, proceeds thus—"in which clause some general words are mentioned concerning other forfeitures to be made from, and after, &c. by virtue, or in pursuance, of any act or acts, upon which words a doubt hath arisen, whether, by the generality thereof, the right and liberty of appealing to the commissioners of appeals, from judgments given by the commissioners of excise, in causes and prosecutions on account of forfeitures and offences relating to the duties of excise, and the jurisdiction and power of the commissioners of appeals to hear and determine such appeals; and also the right and liberty of appealing to quarter sessions, in cases where judgment be given by two justices, in prosecutions before them, for forfeitures and offences relating to the duties on malt, &c. be not taken away and repealed. Now, for preventing and avoiding all such doubts and questions, and declaring and re-establishing the right and liberty of appealing, in the respective cases before-mentioned, be it enacted, that neither the said act, nor any clause, matter, or thing therein contained, did, or doth extend to take away, remove, or alter the

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right and liberty of appealing in the respective cases before-mentioned, be it enacted, that neither the said act, nor any clause, matter, or thing therein contained, did, or doth extend to take away, remove, or alter the right and liberty of appealing in the respective cases before-mentioned, or in any of them; and such right and liberty of appealing, shall continue, &c. It is observable, on this clause of the statute of Geo. 2., that in speaking of the doubts, whether the right of appeal was not taken away from judgments by the commissioners, in cases of forfeiture, it adds, and offences relating to the duties of excise, which shows that the legislature did not mean specific forfeitures only, but also pecuniary forfeitures; and by mentioning appeals, and not *certiorari's* (which are spoken of in the same breath in the act of Geo. 1.; and if there was a doubt about the one, there must have been the same about the other,) it seems plain, that the legislature intended that *certiorari's* should be taken away, and the right of appeal only should remain; that it was thought such a distinction was proper; and that one appeal ought to be preserved in cases where the *certiorari* was taken away, is plain; because, with regard to hides, and malt, respecting which the appeal is saved by the statute of Geo. 2., the *certiorari* is expressly taken away by 9 Anne, c. 11. s. 47. and 12 Anne, st. 1. c. 2. s. 37. We are, therefore, all of opinion, in this case a *certiorari* does not lie; but if it did, it must be granted upon cause shown. And as the affidavits in support of the present application do not proceed upon any alleged want of jurisdiction, but contain objections to the conviction on the merits, the court would not grant the *certiorari* if they had power to do it; for those objections are, more properly, the subject matter of an appeal, and the defendant has not chosen to resort to that remedy.—Rule discharged.

(b) For harbouring tea, spirits, &c.

REX v. ABBOTT. M. T. 1781. K. B. 2 Doug. 553.

This was a conviction by two Justices, upon the statute 11 Geo. 1. c. 30. s. 16 for harbouring tea and spirits. On the affidavit of the defendant, and another person, a rule was obtained for the two justices to show cause why a writ of *certiorari* should not issue, directed to them, to remove into this court all records of conviction before them had, on the 17th of June, against the defendant, for the forfeiture of eight bags of bohea tea, two bags of congou tea, 20 casks of geneva, and one cask of brandy, and treble the value thereof by her incurred, for, or by reason of her harbouring, keeping, or concealing the same. On showing cause against the rule it was contended; 1st, that as the affidavit on which the rule was obtained went only on the merits denying the truth of the charge, the court, if they had the power of granting a *certiorari*, would not do it; an inquiry into the merits, being, properly, the subject matter of an appeal, and not competent to this court; 2dly, that no *certiorari* would lie in this case. The offence was created by 11 Geo. 1. c. 30. s. 16; and by s. 39. of the same statute it is enacted, "that all fines, penalties, and forfeitures by this act before imposed, of and concerning the suing for, recovering, and dividing whereof other directions are not herein given, shall be sued for, recovered, levied, or mitigated by such ways, means, and methods as any fine, penalty, or forfeiture is or may be sued for, recovered, levied, or mitigated, by any law or laws relating to his majesty's revenue of excise, or any of them, or by action, &c.;" and it was contended, that these general words have the same operation as if the specific clauses relative to matters of jurisdiction, contained in the former excise laws, had been re-enacted, verbatim in this, and were adopted merely to avoid unnecessary repetition. That by the statute of 10 Geo. 1. c. 10. it is expressly enacted, s. 42. "that the judgment which shall be given in pursuance of that act, by the commissioners of excise and justices of the peace respectively, shall be final, and not liable to be removed by *certiorari* into any of the courts at Westminster." By s. 21. of the act of 6 Geo. 1. c. 21. the *certiorari* is expressly taken away as to the forfeiture created by that section; and by s. 22. generally, "as to every other forfeiture which shall or may be made, by virtue or in pursuance of any act or acts whatsoever, relating to the duties of excise, or any other duties, under the management of the com-

A *certiorari* will lie to remove a conviction either by commission-ers of excise, or justices of the peace under the 11 Geo. 1. c. 30. s. 16. for harbouring tea and spirits. [230]

missioners of excise." The court, after argument, took time to consider; and afterwards Lord Mansfield delivered himself to the following effect: this case has been argued, on the part of the prosecutor, on two grounds; viz. 1st, that by law a certiorari is not grantable; 2dly, that if there were a power in the court, in their discretion, to grant it, they ought not to do it upon the present occasion, because the objection is upon the merits, and not to the jurisdiction; and the case of *Rex v. Whitbread* has been cited as in point. On the other side it is said, that it does not apply, because the conviction there was by the commissioners. But we are all clearly of opinion, that there is no distinction in that respect. The jurisdictions by all the acts relative to the excise, are distinct in their limits; that of the commissioners is within the bills of mortality; that of justices in all other places; but in every other point of view their powers are the same, and wherever the statutes take away the certiorari in the case of conviction before the commissioners, they also do so as to convictions before justices. However, notwithstanding this, we think that the case of the *King v. Whitbread*, is not an authority to govern this case; that was a conviction on a statute long prior to 6 Geo. 1. viz. 12 Car. 2. c. 24. supposing it therefore clear that the act of 6 Geo. 1. takes away the certiorari in the case of all penalties and forfeitures created before that time, it does not necessarily follow, that it is taken away in cases of forfeitures and penalties introduced since. On the behalf of the prosecutor it was contended, that the general words of s. 39. of the stat. 11 Geo. 1. c. 30. re-enact those of 10 Geo. 1. c. 10. 42. as much as if they had been expressly repeated; this is certainly true, as to the form and mode of prosecution and conviction: but it is not a consequence that it is equally true, as to what shall or may be done after conviction. If [231] this is not clear, and we think it is not, then the old general rule applies, viz. that nothing but express negative words shall take away the jurisdiction of this court, we are therefore all of opinion, that the certiorari is not taken away in the present case. But the motion has been made not on an objection to the jurisdiction, but on the merits, and in the *King v. Whitbread*, the court thought that would have been a sufficient reason for not granting a certiorari; if it had been otherwise competent, we all adhere to that opinion.—Rule discharged.

III. OUT OF WHAT COURT IT ISSUES.

A *certiorari* may be issued either out of the courts of chancery, King's Bench or common Pleas; see 2 Lord Raym. 836; 1 Salk. 148; 7 Mod. 138; Barnes. 345; Prac. Reg. 221.

IV. IN WHAT COURTS IT LIES.

(A) IN GENERAL.

A *certiorari* lies to all courts where the superior tribunal can administer the same justice as the court below; and though the cause cannot be determined in the higher court, yet this writ may be granted if the inferior court have no jurisdiction over it, or do not proceed therein according to the rules of law; see Lil. K. B. 253; 2 Rol. Abr. 69; Carth. 75; 1 Salk. 352; 6 Mod. 177; Sayer. 156; 2 Burr 777; 2 Blac. Rep. 1060; 2 B. & P. 93.

(B) TO THE COMMON PLEAS.

BARSDALE V. DREW. E. T. 1692. K. R. 4 Mod. 104.

On a writ of error brought on a judgment in the C. B. the judgment was affirmed in this court. The plaintiff brought a *certiorari* to remove the recognizance which was given in C. B. on the allowance of a writ of error, so that he might sue out a *scire facias* against the bail. It was said that this court could not grant such a writ, because the recognizance is a record, which is not to be removed by a *certiorari*; for that only removes the tenor of the record, and not the record itself. *Per Cur.* But in the courts at Westminster, the recognizance is taken by itself, and is no part of the record on the roll; and therefore a *certiorari* may be obtained to remove it, though it cannot remove the record itself; and it was allowed accordingly.

(C) TO JUSTICES OF OYER AND TERMINER.

If a judgment in the C. P. be affirmed in K. B., a *certiorari* lies to remove the recognizance of bail into the latter court.

1. **REX V. THE DUTCHES OF KINGSTON.** E. T. 1775 K. B. Cowp. 283. A *certiorari* lies to the justices of oyer and terminer, to remove into this court an indictment for bigamy; the court granted the writ.

2. **ANON.** E. T. 1696. K. B. 1 Salk. 141.

A motion was made for a *certiorari* to remove an indictment found at the sessions of gaol delivery for barrettry, and the court said, it is never granted without some special cause.

(D) TO THE QUARTER SESSIONS.

REX V. HUBE. H. T. 1794. K. B. 5 T. R. 542.

The defendants were indicted upon the 1 W. & M. c. 18. which enacts, that "if any person or persons shall willingly, &c. disquiet, or disturb any congregation permitted by the act, &c. such person or persons upon proof thereof, before any justice of the peace, by two or more sufficient witnesses, shall find two sureties to be bound by recognizance in the penal sum of 50*l.* and in default of such sureties, shall be committed to prison, there to remain, &c. and upon conviction of the said offence, at the said general or quarter sessions, shall suffer the pain and penalty of 20*l.*" The indictment being removed by the prosecutor into this court, before verdict, by *certiorari* it was moved that as the penalty of 20*l.* was to be paid upon conviction of the said offence at the said general or quarter sessions, the statute intended to confine the cognizance of the offence to the sessions, and that the power to remove by *certiorari* was therefore taken away by necessary implication. But the court held that the *certiorari* was not taken away by this statute, and that the indictment was consequently well removed.

(E) TO THE OLD BAILEY.

1. **REX V. GUNSTON.** E. T. 1725. K. B. 1 Stra. 533. S. P. **REX V. ILES.** M. T. 1717. K. B. 1 Sess. Ca. 321.

On motion for a *certiorari* to the Old Bailey to remove an indictment against a person of credit, for falsely pretending that a person of no reputation was J. T., per quod the prosecutor was induced to trust him; the court refused the rule, the application being made by the defendant.

2. **REX V. FERGUSON.** E. T. 1738. K. B. Ca. Temp. Hard. 369. S. P. **MORGAN'S CASE.** H. T. 1694. K. B. Comb. 319. S. P. **REX V. WELLS.** E. T. 1724. K. B. 1 Stra. 549. S. P. **ANON.** E. T. 1637. K. B. 1 Salk. 144 S. P. **NEHUFF'S CASE.** E. T. 1705. K. B. 1 Salk. 151.

It was moved for a *certiorari* to remove an indictment for perjury against the defendant, from the sessions at the Old Bailey; but the court would not grant it saying, though it was done in the case of the King v. Morgan, *infra*, that was on the extraordinary circumstances of the case.

3. **REGINA V. KNATCHBULL.** H. T. 1703. K. B. 1 Salk. 150.

A motion was made for a *certiorari* to remove an indictment found at the assizes against Knatchbull and others, but denied, on the ground that the same thing was done in Thornbury's case, who with others, was indicted at the Old Bailey for a jacobite conventicle, and it was pressed by him in person to have a *certiorari*, intimating partiality and prejudice in the Lord Mayor and Alder-riff. men against him; but it was denied for this particular reason, viz. that the motion happened in the end of Hilary term, so that it would occasion a delay of justice; otherwise it seems the court would have granted it.

4. **REX V. WEBB.** H. T. 1738. K. B. 2 Stra. 1068.

A *certiorari* was granted to remove an indictment for perjury, from the Old Bailey, at the defendant's request, on an affidavit, that the prosecutor's attorney was under the sheriff of Middlesex, and attended the grand jury on finding the bill.

5. **REX V. MORGAN.** M. T. 1728. K. B. 2 Stra. 1049.

A *certiorari* was granted to remove an indictment of perjury from the Old Bailey, on the part of the defendant, on an affidavit that he had paid costs twice for not going to trial; the judges being gone away; which the court allowed to be a special reason, that distinguished this from the common case, where *certiorari's* are denied.

prosecutor
to proceed*

And the
Court al-
lowed a cer-
tiorari to
remove an
[234]

But it will
not lie on
the ground
that the de-
fendant is a
person of
fortune and
character,
and not to
be tried
with com-
mon male
factors.

A certiorari
lies to the
city of Lon-
don;

As to re-
move a
plaint out
of the
sheriff's
court;

Or to the
counties pa-
latine;

Or to re-
move a
cause from
the Isle of
Ely;

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6. ANON. E. T. 1815. K. B. 1 Chit. Rep. 571. n.

Motion to remove an indictment against defendant from the Old Bailey in order that the defendant might be tried at Gloucester, where he resided, and where he held the office of Deputy Register of the division of Gloucester, an office which requires his daily personal attendance for the purpose of granting probates. *Pur Cur.* We will grant it on the special grounds stated. See 1 Chit Cr. L. 375.

indictment from the Old Bailey where the party was a public officer, living at a great distance, and his personal attendance required there.

7. *REX V. GOULSTON.* T. T. 1723. K. B. 1 Sess. Ca. 314. S. P. *REX V. MORGAN.* T. T. 1737. K. B. 2 Stra. 1049.

A motion was made for a *certiorari* to remove an indictment against the defendant at the Old Bailey. It was an indictment for cheating. The application was made, on the ground that the defendant being a gentleman of fortune and character, ought not to be tried amongst common felons. But the court refused the rule, saying—they never granted a *certiorari* but on particular grounds; and the defendant being a man of character, is no reason why we should indulge him in this case.

(F) TO THE CITY OF LONDON.

1. *REX V. WILLIAMS.* T. T. 1757. K. B. 1 Burr. 386.

On showing cause against quashing a *certiorari* to remove from the sessions of the city of London, an information on the 1 Jac. 1. c. 22 relative to tanners. It was objected that it did not lie. But the court over-ruled the exception.—See *Com Dig Certiorari*, A; *Bac. Ab. Certiorari*, B.

2. *DORRINGTON V. EDWARDS.* M. T. 1685. K. B. Skin. 244.

A replevin, by plaint, was sued in the sheriff's court of London, and pledges there found *de retorno habena si*, &c. This plaint, after being removed, according to the custom, into the mayor's court, was removed by *certiorari* into this court.

(G) TO THE COUNTIES PALATINE.

ZINK V. LANGTON. T. T. 1781. K. B. 2 Doug. 749.

In this case, a rule was obtained to show cause why an attachment should not issue against the prothonotary of the court of common pleas for the county palatine of Lancaster, for not obeying a writ of *certiorari*, which had been directed to him, to remove the proceedings in this cause from that court into this. The court said—there is no doubt but this court may, under particular circumstances, as in a case which calls strongly for a trial at bar, grant a *certiorari* to remove proceedings from the county palatine. But such a writ cannot be sued out without laying a ground for it.

(H) TO THE ISLE OF ELY.

CROSS V. SMITH. H. T. 1701. K. B. 1 Salk. 147; S. C. 2 Lord Raym. 836.

A writ of error was brought in B. R. on a judgment in the court of the Isle of Ely, in an action upon the case for words. The error assigned was, that a *certiorari* issued out of C. B. to remove the cause, and yet they proceeded below afterwards. The defendant in error pleaded a grant to the Bishop of Ely of consuance of pleas, and showed allowance of it in this court; (the K. B.) 21 E. 3; and that the cause arose within the jurisdiction; and that they returned this matter to C. B., upon the writ of *certiorari*, and so the court below had good authority to proceed. To this plea there was a demurrer. It was insisted on for the defendant in error, that no *certiorari* ought to lie to the court of Ely, by reason of the franchise. But, *per Cur.* If the franchise be *ténere placita*, then this court has a concurrent jurisdiction, and the defendant may choose whether he will be sued there, or in the king's superior court; for he may be a stranger in the franchise, and not able to find bail there, and it may be dangerous to be tried by a jury of strangers. Besides, as the statute of the 27 H. 8. says, there is as much difference between the king's ministry of justice in the superior court and his inferior courts, as between being governed by

* So after a special verdict upon which difficult points of law arise, the record may be removed by *certiorari* into the K. B. to be there argued and decided; *Rex v. Higgins*, M. T. 1780; K. B. 2 Ld. Raym. 1674, abridged *post*, tit. Murder.

The king in person, and by his deputy; therefore, it is that this court possesses superintendency, and, to prevent oppression may award a *certiorari* to any inferior court; and the subject's right to writs of *certiorari* appears by the 43 Eliz. c. 5. and 21 Jac. 1. c. 23. which restrains the abuse of them.

(I) TO THE CINQUE PORTS.

REX v. CORPORATION OF WINCHELSEA. E. T. 1673. K. B. 2 Lev. 86.

Or it seems to the Cinque Ports;

Certiorari was directed to the mayor, jurats, and commonalty, to remove orders made by them against proprietors of lands, for the relief of the corporation. They returned, that time out of mind, &c. there have been five ancient vills, *scilicet*, Hastings, Dover, Sandwich, New Romney, and Hith, called the Cinque Ports; and that time out of mind, Rye and Winchelsea have been members thereof. And that time out of mind, &c. *Brevia Domini Regis, &c. non currunt nec currere debent seu consueverunt* save only in matters touching the person of the king, felony, or appeals. This return was adjudged insufficient; for the Court of K. B. is to see that the subjects be not injured in their estates, as well as in their persons. Cro. Eliz. Brown's case, *habeas corpus* or *mandamus* lies thither. And by these orders they have imposed levies upon the estates of the tenants, and if such orders be not examinable here, they would be equal to acts of parliament; and in this case is not merely civil between party and party, but between corporation and party. Also the return here was not positive, but under a *cumque*, by way of recital of their privileges. Upon this, the return was quashed, but no fine for contempt, because they submitted to make return of the fact. See 1 Lill. R. R. 253; Hawk. P. C. 27. s. 24.

(J) TO THE COLLEGE OF PHYSICIANS.

GROENWELT v. BURWELL. T. T. 1699. K. B. 1 Salk. 144; S. C. 1 Lord Raym. 213.

The censors of the college of physicians have power by their charter, confirmed by act of parliament, to fine, &c. for mal-practice in physic—and accordingly they condemned Dr. Groenwelt for administering *insalubres pillulas, et noxia medicamenta*, and fined and imprisoned him. And the question being, whether error or *certiorari* lay, &c. it was held; 1st, that error would not lie upon the judgment, because their proceeding is not according to the course of the common law, but without indictment or formal judgment; yet, 2dly, that a *certiorari* lies; for no court can be intended exempt from the superintendency of the king in his court of B. R. It is a consequence of every inferior jurisdiction of record, that their proceedings be removeable into this court, to inspect the record, and see whether they keep themselves within the limits of their jurisdiction; vide Cro. Jac. 489. By the 23 H. 8. c. 5. the commissioners of sewers are to certify their proceeding into Chancery, and the 13 Eliz. directs, that the commissioners shall not be compelled to make any certificate. Upon this, by mistake, they brought themselves not accountable on a *certiorari*, and refused to obey a writ of that description, which had been issued out of the Court of K. B. and were afterwards punished.

(K) TO COURTS LEET.

1. REX v. ROUFELL. T. T. 1776. K. B.; Cowp. 458.

A *certiorari* lies to remove a presentment from a court-leet.

On a rule to show cause why a *certiorari* should not issue to remove a presentment against the defendant from a court-leet, for keeping a disorderly house, the Court said—we are clear that a *certiorari* ought to go, the presentment cannot be traversed at the leet, but the proper method is to grant a *certiorari*, that it may be traversed here. It would be strange to say the defendant should have no opportunity of being heard; that would be giving a court-leet a power superior to that of any other jurisdiction in the kingdom. Rule absolute.

But a *certiorari* to remove the record and proceed out of a court leet imposing an amercedment which had been estreated i

2. REX v. HEATON. M. T. 1787. K. B. 2 T. R. 184.

The defendant had been amerced at the court-leet of the liberty of the Savoy, the amercedment affeered, and afterwards estreated by the steward into the court of the duchy chamber of Lancaster; and the usual writ of *levari facias et capias* having issued under the duchy seal, the fine was in consequence paid by the defendant. A motion being made for a *certiorari* to remove the record

the *duchy* and proceedings. The Court refused the writ, being of opinion that the writ *chamber of* would not lie, the fine has not been entered and paid.

Leicester,
and paid,
and refused.
et.

L. T. F. 171. *See* *Leicester*.
A *certiorari* lies to all inferior tribunals. *see* 2 Lord Raym. 836; S. C. 1
Salk. 149; 1 Salk. 71; 12 Mod. 615.

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M. T. *Leicester*.

A *certiorari*
lies in the
head after
in nullum
erratum
pleaded.

Pratt v. Hart, 1 E. T. 130. K. B. 1 Sess. 214.

Error on a judgment in the King's Bench of Ireland, on a writ of error there on a judgment in the county of Dublin, upon an obligation, wherein the plaintiff declared that the defendant did acknowledge himself to be bound in 1000*l.* whereas it is paid; and the defendant cravedoyer of the condition, which is to pay 50*l.* with interest, 30 days after notice; and pleaded that he paid the debt in satisfaction within 30 days after notice. The plaintiff replies non-pa, &c. within 30 days, *ad hoc petit quod inquiretur per peritiam, et productis Test. Scilicet, &c.* Defendant demurred; and the plaintiff joined in demurrer, and judgment was given for the plaintiff. A motion was made for a *certiorari* to lay and, which was opposed, because here was nothing wanting, and no error could be alleged, for the errors were rather surplussage, and the replication could never be mended, unless they returned another record, which is not allowable in any case; besides, diminution could not be alleged, nor a *certiorari* granted, after in *nullo est erratum* pleaded. But,

Per Cur. A *certiorari* may be granted at the prayer of the defendant in error, *ad informetum curie* at any time, and when returned it will appear if the same record or not.

(N) To BERWICK.

Or to Ber-
wick.

REX v. COWLE. T. T. 1759. K. B. 2 Burr. 834; S. C. 2 Kenyon 519.

On a rule to show cause why a *superedeas* should not issue to a *certiorari* directed to the mayor, and corporation justices of Berwick, to remove an indictment, the question was, whether this Court have jurisdiction over Berwick, where the proceedings are not according to the laws of England, but according to the laws of Scotland. The Court said: there is no doubt as to the power of this Court, where the place is under the subjection of the crown of England. There is no instance of a doubt ever having been made before the present case, concerning the authority of this Court to send a writ of *certiorari* to Berwick; and we are all clearly of opinion that the Court by law has such a power; therefore, the rule to show cause why a *superedeas* to the writ of *certiorari* should not issue, must be discharged.

(O) To WALES.

1. *REX v. GRIFFITH*. E. T. 1790. K. B. 3 T. R. 658. S. P. *REX v. LEWIS*
E. T. 1727. K. B. 1 Stra. 704.

Or to Wales
to remove
an indict-
ment,

This was an application by the prosecutor of an indictment, for a misdemeanor for a *certiorari* to remove the same from the great sessions in Wales. The Court doubtfully granted a rule to show cause, which was afterwards made absolute.

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As for man-
laughter;

2. *ANON* H. T. 1670. K. B. 1 Vent. 93.

A *certiorari* was prayed to remove an indictment of manslaughter out of Wales, which the Court at first hesitated to concede, but afterwards granted.

Or murder.

3. *REX v. MORRIS*. T. T. 1670. K. B. 1 Mod. Rep. 64. 68; S. C. 1 Vent. 146; S. C. 2 Keb. 681. 685. 724. 797.

An indictment against one Morris, in Denbighshire, for murder, was removed into this court by *certiorari*.

And may
be tried in
the next En-
glish coun-
ty,* on an
affidavit
that justice
would not
be done in
Wales,

4. *REX v. PARRY*. M. T. 1758. K. B. 2 Kenyon. 370.

On an indictment at the assizes for the county of Carnarvon for a felony, in buying a small quantity of corn, which had been taken from engrossers, though they swore they did not know it was feloniously taken. On motion for a *certiorari* to remove this indictment, upon suggestion, by affidavits that

* Or is that county in which the fact was committed; *Rex v. Athos*, 3 Mod. Rep. 186. *abridged post*, tit. *Habeas Corpus*.

they could not have impartial justice upon a trial there ; and, that it might be tried in the next English county, the Court granted a rule to show cause.

5. LEWIS V. JONES. E. T. 1704. K. B. 6 Mod. Rep. 138.

On a writ of error on a judgment in Wales, the *placita* were, &c. at a great session of our lord the king, &c. holden before A. and R. justices of our lady the queen, &c. This was holden a variance. But it was doubted, whether if they would amend below, a *certiorari ad informandum conscient* ought not to go. But it appearing that a former writ of error had been brought, and a *certiorari* and an amendment of such faults as had been then discovered, and that this was the second writ and faults, still they said they would consider well of it before they would send any more *certiorari*'s ; for when would there be an end at this rate. The Court, after taking time to consider, granted the writ.

So it lies al though the record has been before amended.

V. FOR WHOM IT LIES.

(A) AS TO THE CROWN AND PROSECUTOR. See Div. post VIII. Effect of statutes restraining the courts from granting a *certiorari*.

1. REX V. CLACE. T. T. 1769. K. B. 4 Burr. 2458. S. P. REX V. EATON. M. T. 1787. K. B. 2 T. R. 89. S. P. REX V. STANNARD. H. T. 1791. K. B. 4 T. R. 161. S. P. LAMPRIERE'S CASE. H. T. 1669. K. B. 1 Mod. 41. S. C. 1 Vent. 68. S. P. REX V. THE INHABITANTS OF BODENHAM. T. T. 1774. K. B. Cowp. 78.

On motion for a *certiorari* to remove some orders of justices, made for the relief of glass-makes, from an overcharge upon them by the officers of excise, it was holden, that the king had a right, in every case where the crown is concerned, to demand a *certiorari*, unless that right be restrained by statute.

2. REX V. CLARKE. T. T. 1769. K. B. 4 Burr. 2460. S. P. ANON. M. T. 1737

K. B. Ca. Temp. Hard. 165.

The Court, in commenting on the writ of *certiorari*, said, the true distinction is, that where the prosecutor moves for it, it goes of course ; but the defendant must show a special ground.

3. REX V. THOMAS. M. T. 1815. K. B. 4 M. & S. 442.

The Attorney-General moved for and obtained a rule nisi for a *certiorari*, to be directed to the justice of oyer and terminer, and gaol delivery, &c. of the city of Rochester, to remove an indictment for murder, &c. into this court ; and also for a *habeas corpus* to remove the accused. The charter of the city was relied on by the opposite counsel, which directed all murders, felonies, &c. under certain circumstances, to be inquired of by the justices of the said city. So that all writs be directed to the ministers of the mayor (one of the quorum of justices,) and by them executed, without any writ to the sheriff of Kent, with a *non intromittant* as to the keepers of the peace, &c. in Kent. But Lord Ellenborough, C. J. said : I have been inquiring of the officer, if the practice is as I supposed it to be, and find that the Attorney-General has not the power, of himself, to issue a *certiorari*, but must make application to this court ; but upon such his application being indorsed, it is a matter of course with the Court to grant the *certiorari*. We think that the Attorney-General is, therefore, entitled to the *certiorari*, and as a consequence to the *habeas corpus*. See 38 Geo. 3. c. 52. s. 3 ; 5 Geo. 2. c. 37 ; 5 T. R. 478 ; and cases in notes 4. M. & S. 444.

A *certiorari* is demandable of absolute right by the king.† The prosecutor is entitled to a *certiorari* as of course.

(B) AS TO THE DEFENDANT.

1. REX V. EATON. M. T. 1787. K. B. 2 T. R. 89. S. P. REX V. STANNARD. H. T. 1791. K. B. 4. T. R. 161.

Per Cur. The king has a right to remove proceedings by *certiorari* of course ; but where a defendant makes an application of this sort, he must always lay a ground for it before the Court ; and this rule, as to defendant, has obtained since the time of Car. 2.

† Therefore when it is applied for by the Attorney-General, or other officer of the crown, either as a prosecutor or when he takes up the defence of the party indicted, on account of his being an officer of the crown, or for some other reason, it must issue as a matter of course, and the Court has no discretion as to conceding or refusing it ; see 4 Burr. 2458 ; 1 East. 308 ; Hand. Prac. 87.

A defendant is not entitled to a *certiorari* as of course.

- [240] 2. ANON. E. T. 1702. K. B. 11 Mod. Rep. 31. S. P. REX v. BESTLAND.
 But must show special cause. H. T. 1745. K. B. n Stra. 1202. S. P. GARLAND v. BARTON. M. T. 1737. K. B. And 27.

The court will not incline to grant a *certiorari* to the justices of peace when a person is convicted, but the justices ought to give judgment ; for a *certiorari* to justices is rather to aid them when a man would avoid their jurisdiction, and so to bring him into this court, which has a more extensive power to punish him.

Unless the prosecutor consents,

3. REX v. THE DUCHESS OF KINGSTON. E. T. 1774. K. B. Cowp. 283.

It was moved, on the part of the defendant, for a *certiorari*, to be directed to the justices of oyer and terminer at Hicks's Hall, to remove into this court an indictment found against her, at the sessions their, for bigamy. The court said that the motion was irregular ; for a defendant has no right to remove an indictment, for felony, from Hicks's Hall, without the consent of the prosecutor.

4. GARLAND, *qui tam*, v. BARTON. M. T. 1737. K. B. And. 27. 174. 291 ; S. C. 2 Stra. 1103.

As that the Court be low has no jurisdiction over the cause.

A *certiorari* was prayed to remove an information, before justices, against a person for non-residence, because the justices had no power over the matter in dispute. The Court said : that this was a good reason for granting the present *certiorari*, the justices having no jurisdiction.

5. REX. v. HUNT AND OTHERS. H. T. 1820. K. B. 2 Chit. Rep. 130 ; S. C. 2 B. & A. 444.

But a *certiorari* will not be granted to remove an indictment against several defendants charged with a misdemeanor, unless they all concur in the application

A rule *nisi* had been obtained, by one of several defendants, for a *certiorari* to remove an indictment against them for a misdemeanor. It did not at that time appear, upon affidavit, that the other defendants, who were not present, had assented to the application ; in consequence of which, when cause was now shown against it on that ground, the Court said : that they must require some evidence that all the defendants were *bona fide* consenting to the application, and really meant to be bound by such rules as they might think proper to pronounce. The defect was afterwards supplied by the production of affidavits showing the consent of all parties, when the court allowed the *certiorari* to issue ; observing, how essential it was to require such affidavits ; and that the consent of counsel, unsupported by such depositions, would not have sufficed.

[241] The application for a *certiorari* to remove a conviction must be made with in six months.

VI. OF THE APPLICATION FOR; WHEN TO BE MADE; AND THE MODE OF APPLYING FOR.

(A) AS TO THE TIME WHEN APPLICATION SHOULD BE MADE

(a) *In general.*

1. By the 13 Geo. 2. c. 18. it is enacted, that no *certiorari* shall be granted to remove any conviction, judgment, order, or other proceedings, before any justice of the peace, or the general quarter sessions, unless it be applied for within six calendar months after such proceedings had or made.

2. *In re* KAYE. E. T. 1822. K. B. 1 D. & R. 436.

But where a conviction is affirmed by the sessions, the defendant may

The Court being here called upon to decide, whether the six months limited for bringing a *certiorari* was to be computed from the time a conviction was affirmed by the sessions, or from the time of the conviction by the justices below, held, that the time was to be reckoned from the period when the order of sessions was made.

have a *certiorari* at any time within six months from such affirmance;

3. REX v. BOUGHEY. E. T. 1791. K. B. 4 T. R. 281. S. P. REX v. THE JUSTICE OF SUSSEX. 1 M. & S. 630.

And if it appear that more than six months have elapsed, the writ will be quashed. A *certiorari* will not

The Court, in this case, said: if it appear that more than six months have elapsed between the date of a conviction before justices of the peace and the time of applying for a *certiorari*, contrary to the 13 Geo. 2. c. 18. s. 5. they would set aside the writ.

- 4 REX v. THE JUSTICES OF SUSSEX. T. T. 1813. K. B. 1 M. & S. 630.

A rule *nisi* had been obtained for a *certiorari* to remove an order of sessions confirming an order of removal by two justices. It appeared from affidavits,

that the appeal to the sessions had been heard and determined, subject to the opinion of this court, on a case to be stated; that such case was afterwards prepared, and settled by the justices at sessions. Cause was shown against the rule being made absolute, on the ground that the *certiorari* to remove the above order had not been applied for within six calendar months after such order made, nor six days' notice thereof, in writing, given to the justices, according to the 13 Geo. 2. c. 18. s. 5. It was, however, urged that the statute did not apply to this case; that the reason of the provision requiring the six days was given in the act, viz. to the end that the justices might show cause, if they should think fit, against the granting such *certiorari*; but that, after the justices themselves had settled the case, and thereby expressed their desire to have it brought up, the reason did not apply, because it could not be presumed that they would now think fit to oppose the *certiorari*.

Lord Ellenborough discharged the rule, observing: admitting that the magistrates may have wished, at the time when they settled the case, to have it brought up, still there may be reasons why they might think fit to show cause; and unless it can be shown that it would serve no possible end to give them six days' notice, we cannot presume.—Rule discharged. See 5 T. R. 279. 281. n; 1 East. 298.

5 REX v. THE JUSTICES OF SUSSEX. T. T. 1813. K. B. 1 M. & S. 734.

The question which arose in this case was, whether a *certiorari* to remove an order of sessions, confirming an order of removal, subject to a case to be stated, must be applied for within six calendar months after making the order of sessions, or within six months after settling the case.

Lord Ellenborough said: the statute is framed in express terms; that the *certiorari* shall be applied for within six calendar months after order made; and a strict adherence to such practice will be beneficial, as it will tend to accelerate the settling of cases intended to be brought up for our revision.

6 REX v. BERKLEY. E. T. 1754. K. B. Sayer. 123; S. C. 1 Kenyon. 80.

Upon a rule to show cause why a *certiorari* should not issue to remove an order made by the defendants, two justices of the peace it appeared that the order was to empower one T., a glass bottle-maker, to deduct out of future duties, a sum of money sufficient to reimburse himself another sum of money, which was adjudged by the defendants to be an overcharge in former duties charged upon him; and that order having been made above six months, the question was, whether 13 Geo. 2. c. 18. limiting the application to six months, applies to the king. And the Court were of opinion, that it did not extend to the crown. The object of the legislature being professedly to prevent vexatious delays, and the words of the statute being, that the party intending to sue forth a *certiorari* shall give notice to the justice, &c., clearly shows it is inapplicable to the crown; for the word party in a statute does not comprehend the king.

(b) *Before issue joined.*

The application for a *certiorari* should be made before issue joined; Hawk. P. C. c. 27. s. 30; 4 Bla. Com. 321; Burn, J. *certiorari* 1.

(c) *After verdict.*

A *certiorari* will not be granted after verdict in the absence of special cause; see 7 T. R. 372; 1 Salk. 149; Carth. 6; 13 East. 411; 6 Mod. 17; 17; Hawk. P. C. c. 27. s. 31; Bac. Ab. *certiorari* A.; Williams, J. *certiorari* 2. But when there has been a special verdict, even at the Old Bailey, it may be removed in order to be argued and more solemnly decided in a superior court; Hawk. P. C. c. 27. s. 31; 2 Lord Raym. 1574.

(d) *After conviction.*

1. REX v. THE INHABITANTS OF THE COUNTY OF OXFORD. E. T. 1811. K. B. 13 East. 411.

1. A *certiorari* was applied for to remove an indictment for a misdemeanor, and proceedings thereon, at the assizes, after conviction, and before judgment, for the purpose of moving for a new trial, on the judge's report of the evidence, upon the ground of the verdict being against evidence, and the judge's direction

be granted to bring up an order of removal after six months from order made by the sessions, or without six days' notice, not to withstand the order was made subject to the opinion of the Court of K. B. on a case to be stated, which case was afterwards stated and settled by the justices at sessions. The six months ran from the time of making the order, and not from settling the case. The time is limited for obtaining a *certiorari*, does not, however, apply to the crown.

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A *certiorari* will not be granted to remove an indictment from an inferior jurisdiction

after conviction. The court, however, refused it; Lord Ellenborough, C. J. observing: "I would not have the motion for a moment entertained, that we have the power of entering into the merits of verdicts, and granting new trials in proceedings before inferior jurisdictions."

See Carth. 6; Dal 35, pl. 7; 7 Mod. 84; Holt's Rep. 184; Salk. 650; 1 Lev. 113. 393. 499; 7 Vin. Abr. 24. 25; Fort. 198, Sayer. 202; 1 Doug. 380; 1 T. R. 453.

Especially after the committing of the offence has been confessed.

2. *REX V. GWYNNE*. H. T. 1759. 2 Burr. 740; S. C. 2 Kenyon. 440.

Three judges on this indictment granted a *procedendo* at the instance of the defendant, to the quarter sessions of Brecon, on an indictment for an assault, because the *certiorari* had not issued till after the defendants had confessed the assault below, though the conviction was after a trial; and though several of the justices were said to be near relations of the defendant.

3. *REX V. NICHOLS*. M. T. 1703. K. B. 6 Mod. Rep. 62. n; S. C. 2 Stra. 1227. *S. P. REX V. PORTER*. M. T. 1703. K. B. 1 Salk. 149; S. C. 2 Lord Raym. 937.

As in the case of a conspiracy.

The defendant being convicted for a conspiracy, removed the same in to this court by a *certiorari*. But the court, after granting a rule to show cause why the *certiorari* should not be quashed, made the rule absolute.

Unless the punishment incurred be certain;

4. *REX V. NICOLS*. M. T. 1742. K. B. 13 East. 412. n; S. C. 2 Stra. 1227.

Or the conviction be only before a magistrate.

Per Cur. A *certiorari* will not lie to to the sessions to remove a conviction for a misdemeanour, before judgment, for the fine being uncertain, the court cannot tell how to assess it, otherwise where the punishment is certain.

5. *REX V. THE INHABITANTS OF SETON*. T. T. 1797. K. B. 7 T. R. 373

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And if a defendant convicted on indictment before an inferior jurisdiction means to object to errors in the record, he should bring error on the judgment, and not remove the record by *certiorari* between conviction and judgment.

The defendants were indicted for not repairing a road, after verdict and judgment at the sessions. A *certiorari* was served to remove the record into this court. On motion to quash it, the court said: in the case of summary proceedings before magistrates, as convictions, &c. they may be removed by *certiorari*, after judgment, because they can only be removed by *certiorari*; but where judgment has been given on an indictment, the record must be removed by writ of error.—Rule absolute.

6. *REX V. JACKSON*. H. T. 1795. K. B. 6 T. R. 145.

After the defendant had been convicted at the sessions, upon an indictment for extortion, and before judgment, it was removed by *certiorari*, when the rule was obtained to show cause why the judgment should not be arrested. but the court said: that the removal of proceedings in this stage from inferior jurisdictions, ought to be discharged. That in cases where the punishment is discretionary, and this court should be of opinion, after hearing the case argued, that the judgment ought to be arrested, a *procedendo* must be awarded, and the party sent back again to the inferior jurisdiction to receive judgment. And they thought they ought to adopt the same mode in this instance; and that the defendant might bring a writ of error after judgment, if the record were erroneous.—*Procedendo* awarded.

(e) *After judgment.*

REX V. THE INHABITANTS OF PENEGOES AND MACHYNLETH. M. T. 1822. K. B. 1 B. & L. 144; S. C. 2 D & R. 209. *S. P. REX V. THE INHABITANTS OF SETON*, T. T. 1797. K. B. 7 T. R. 373.

The Court will not grant a *certiorari* after conviction and judgment at the sessions.

The defendant had been convicted and received judgment at the sessions for the non-repair of a bridge. A motion was now made for a *certiorari*, to remove the indictment into this court for the purpose of having it quashed for several errors on the record.

Per Cur. We must refuse the rule. The defendants ought to have applied for a *certiorari* before the trial, and it ought not to issue in this last stage of the proceedings. The regular and ordinary course is to bring a writ of error.—See 1 Salk. 150; S. C. 6 Mod. 61; S. C. 2 Lord Raym. 971; S. C. 3 Salk. 78; 13 East. 411 and 412. n. a.

(f) *Before appeal.*

REG. GEN. E. T. 1702. K. B. 7 Mod. Rep. 10; S. C. 1 Salk. 147.

A *certiorari* does not lie to remove an or

It is ordered that no order of justices, whereof an appeal lies, be brought

either by *certiorari*, until after an appeal; and if any be, that it be sent back by *procedo*, for the original order is not brought up, but the tenor of it, as appears by the very words of the return.

(g) *Pending an appeal.*

REX V. SPARROW. M. T. 1788. K. B. Cited note 2 T. R. 196. S. P. THE BROUGH OF WARWICK CASE, M. T. 1736. K. B. 2 Stra. 991

One Alder having been committed by the justices as a vagrant, appealed to the sessions against the commitment, and pending such appeal; an application was made for a *certiorari*, the court said—the *certiorari* can not issue; the magistrate having committed to the sessions, and the vagrant having appealed, both parties have thereby agreed that there shall be an appeal to the sessions: the *certiorari* therefore cannot be obtained until the sessions have determined the case.

der of justices until after the time of appeal has expired.

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Pending an appeal to the sessions the Court will not grant a *certiorari*.

(h) *After confession by prosecutor.*

REX V. GWYNNE. H. T. 1759. K. B. 2 Burr. 752.

The court granted a *procedendo*, at the instance of the defendant, to the sessions on an indictment for an assault, because the *certiorari* had not issued till after the defendant had confessed the assault in the court below.

After the defendant has confessed the indictment the prosecutor cannot remove the same.

(B) AS TO THE MODE OF APPLYING FOR.

(a) *Of the notice.*

1. *When essential.*

1. REX V. BATTAMS. H. T. 1801. K. B. 1 East. 298.

A writ of *certiorari* to remove an indictment from the session was sued out by the prosecutor without giving the six days previous notice required by the statute 13 Geo. 2. c. 18. s. 5. in the case of removing "convictions, judgments, orders, and other proceedings," which writ was afterwards handed up to the chairman, and was seen by him, and the other magistrates on the bench. No return was made, however, to the writ, nor any notice taken of it by the court. Upon these facts coming before the court, it was urged and insisted, that the writ of *certiorari* had issued irregularly, none of the magistrates to whom it was directed, having had six days' notice of the issuing of it pursuant to the 13 Geo. 2. c. 18; and that even supposing the writ properly issued, it was not regularly delivered to the justices so as to bind them. Lord Kenyon, C. J. here observed, that if the *certiorari* were produced in court, and came to their knowledge, it would not admit of an argument, whether or not it should be obeyed. Here it was sworn that the writ was handed up to the bench, and seen by several of the magistrates, which is sufficient notice; and the court afterwards stating themselves to be of opinion, that if the writ had improperly issued, there should have been an application to quash it; but that it should not appear that there was a writ of the king's in force, which was disobeyed, said—the act of the 13 Geo. 2. c. 18. does not relate to *indictments*, but merely to summary proceedings before magistrates. The words are "convictions, orders, and other proceedings." The latter must mean other summary proceedings like those before enumerated, and to such only it appears, on the perusal of the act, that other provisions of it apply. And even in the cases of "convictions, judgments, and orders," it has not been considered necessary to give such notice under the statute, where the *certiorari* was applied for at the instance of the prosecutor; for where the *certiorari* has even been taken away by the express words of an act of parliament, if the object of the act have appeared to be (as in this instance) vexation and unnecessary delay, the court has decided that it only meant to deprive the defendants of the writ, and not to take it away from the prosecutors. See 4 T. R. 161; 5 id. 279. 626; 6 id. 194; 2 Hawk. Ch. 27. s. 27; 4 Burr. 2456; Cowp. 78; 2 Stra. 1194. 1209; 3 Rep. 7; 1 Vint. 60; 1 Rol. Abr. 395; 1 Salk. 148. 150; 2 Lord Raym. 838; 1305; Cro. Eliz. 915; Yelv. 32; 1 Keb. 93; 5 & 6 W. & M. c. 11.

It is unnecessary on the removal of an indictment from the sessions to give six days previous notice as required in some instances by the 13 G. 2. c. 18. s. 5, since that statute applies only to summary proceedings.

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2. LEVING V. CALVERLY. M. T. 1701. K. B. 1 Lord Raym. 695; S. C. 12 Mod. 561.

On a writ of error from the C. B. the error assigned was, for want of an original; and on a *certiorari* sued out the return was, that no original, &c. On

And if the want of an original be assigned for error, and on a certiorari, a return made [247] that there is no original, the defendant in error may, on a suggestion that there is an original of another term, sue out a second certiorari without giving notice. The six days' notice required by the 13 G. 2. c. 18. must be given previous to moving the Court. The notice required by 13 Geo. 2. c. 18. s. 5. to be given on removing an order of justices, by certiorari should be given by the party suing out the writ, and that circumstance should appear on the face of the notice itself. A certiorari will be awarded at the instance of the Attorney-General, without any affidavit.

which the defendant in error suggested, that there was an original of another term; and on a certiorari sued out by him, an original was returned, and an entry made thereof on the roll. And it was moved by the plaintiff in error that this was irregular, because the defendant should have given notice in writing to the plaintiff's attorney, before he sued out the certiorari; that the practice was so; and that in the case *Nayden v. Winterbottom, Michaelmas, 10 W. 3.* such a rule had been granted. Holt, C. J. said—that it could be no prejudice in the writ of error; to which it was answered by the plaintiff in error's counsel, that the writ of error was brought for this reason, and therefore he ought to have his costs, which he would lose if the judgment should be affirmed; but to this the chief justice replied, that if the lord keeper had been of opinion that the plaintiff ought to have had his costs, he would not have granted the liberty of filing an original before the costs were paid by the defendant; and the motion was denied. Vide 1 Raym. p. 697.

2. Of the time when to be given.

REX v. THE JUSTICES OF GLAMORGANSHIRE. T. T. 1793. K. B. 5 T. R. 279; S. C. Nol. 249.

A rule had been obtained to show cause why a certiorari should not issue to remove the several orders and entries made by the quarter sessions touching the repairing, &c. of a bridge. It was objected that the writ ought not to issue, because by the 13 Geo. 2. c. 18. s. 5. no certiorari shall be granted to remove any conviction, judgment, order or other proceeding before justices, unless it be applied for within six months after the same shall be had or made, and unless the party suing forth the same, hath given six days' notice thereof in writing to the justices, that no notice had been given to the justices previous to the moving for the writ as directed by the preceding statute. The court said—the objection that six days' notice had not been given, could not be got over, since the party applying should have given notices to the justices of his intention before he moved this court at all.

3. By whom to be given,

REX v. THE JUSTICES OF LANCASHIRE. H. T. 1821. K. B. 4. B. & A. 289.

A rule nisi had been obtained for a writ of certiorari to remove an order of justices. The individual, at whose instance the writ was applied for, made an affidavit in support of the rule; but the notices to the magistrates, under the 13 Geo. 2. c. 18. s. 5., of the intention to apply, for the writ contained no mention of his name, and was signed by the attorney. It was objected that the notice was insufficient. But the court said—the justices ought to have their attention drawn to the name of the party by the notice. Here it does not appear by the notice who the party suing out this writ is; it is signed by the attorney, but he does not add for whom he appears; and for any thing that the court can know, the party suing out the writ may be a mere stranger, and not interested in the order; and it is important that the justices should know this; because he is to be the party who is to enter into the recognizance; and to be ultimately responsible to them for costs.—Rule discharged.

(b) Of the affidavit. 1. When essential

1. **REX v. BURGESS.** E. T. 1754. K. B. Sayer. 128; S. C. 1 Kenyon, 136.

Upon a motion by the Attorney-General to remove an indictment, it appeared that the indictment was for obstructing a highway. On the question, whether a certiorari ought to be awarded in the present case, without an affidavit that a private right could come in question. The court (Wright, J. dissent.) were of opinion, that it was not necessary to produce an affidavit required by the 5 W. & M. c. 11. being only required in the case of an indictment for not repairing a highway; whereas the present indictment is for obstructing a highway. But if the present indictment were within the meaning of the statute, yet as the king is not therein expressly named, he is not bound thereby; and consequently the Attorney-General might move for a certiorari without producing any affidavit.

2. **REX v. FETON.** M. T. 1787. K. B. 2 T. R. 89. S. P. **REX v. CLARKE.** T. T. 1769. K. B. 4 Burr. 2458.

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But such
rule does

Bulter, J. said—that the rule requiring the defendant to make an affidavit, not applying grounds before the court for granting a certiorari, had obtained since the time of Charles II

2. *When to be entitled.*

Ex parte NOHRO. H. T. 1823. K. B. 1 B. & C. 267.

A rule nisi had been obtained for a certiorari; the affidavits were entitled in the cause, which it was contended was irregular. The court, agreeing in this, discharged the rule.

3. *Requisites to.*

The affidavit must state the ground upon which the application is founded; see 2 Doug. 748; 1 East. 303; 2 T. R. 89; 4 Burr. 2458.

(c) *By whom application is to be made.*

REX v. THE INHABITANTS OF PENDERDYN. H. T. 1788. K. B. 2 T. R. 260.

A magistrate made a presentment of a road, as being out of repair; and another person by the magistrate's consent and approbation, sued out a certiorari. On motion to quash it on that ground, the court held it good, observing: that they should look to the magistrate as the person responsible.

(d) *Motion for, when to be made.*

1. *In term time.*

If the application be made in term time, the defendant must move the court by his counsel, on a proper affidavit, for a rule to show cause why a writ of certiorari should not issue: see Hawk. P. C. c. 17. s. 36; Hand. Prac. 38; 5 W. & M. c. 11.

2. *In vacation.*

If the application is made in vacation, the defendant's affidavit is laid before a judge at chambers; and if he thinks sufficient cause is shown, he grants his fiat for the certiorari; see 2 Hawk. P. C. c. 27. s. 36; Hand. Prac. 38; and which fiat, the judge's signature is absolutely essential; see 3 Salk. 80. But in term time, this mode of application must be made to the court; see 1 Barnard, 96.

(e) *Rule for.**

ANON. M. T. 1813. K. B. 2 East. Rep. 137.

The court granted a rule nisi for a certiorari to remove proceedings from before commissioners of sewers, observing that they could not be brought up in the first instance.

(f) *Of the recognizance.*

1. *Of taking the recognizance, and of the sureties.*

1. By 5 W. & M. c. 11. s. 2.† it is enacted, that in term time no writ of certiorari, at the prosecution of any party indicted, shall be granted to remove any indictment or presentment of trespass or misdemeanor, before trial had, from before the said justices in the courts of general or quarter sessions of the peace, unless such certiorari shall be granted upon motion of council, and by rule of court, made for the granting thereof, before the judge or judges of the court of King's Bench, sitting in open court; and that all the parties indicted, prosecuting such certiorari before the allowance thereof, shall find two sufficient manucaptors, who shall enter into a recognizance before one or more justices of the peace of the county or place, in the sum of 20*l.* with condition, on the return of such writ, to appear and plead to the said indictment or presentment

* The Court in general grants a rule to show cause; see 2 Hawk. P. C. c. 27. s. 10; Hand. Prac. 88.

† This and the subsequent statutes extend only to the removal of indictments from the sessions, and do not affect an indictment at Hicks's Hall, or before justices of oyer and terminer, or gaol delivery; see 8 Burr. 1462; 2 Stra. 1162; 1 Burr. 10; and even at the sessions, as these statutes are in the affirmative as to the taking of recognizances, they do not direct the justices of the Court of King's Bench of their common law authority; and therefore, if a judge, granting a certiorari should take a recognizance inconsistent with the form prescribed by these acts, such recognizance will be as effectual as if the statutes had not been passed; but it has been remarked, that in such case the certiorari, if procured by the defendant, will not operate as a superveneas, as the statutes distinctly declare, that the sessions may proceed, notwithstanding any certiorari procured by a defendant, where as such recognizance is not given as is expressly described; see 2 Hawk. P. C. c. 27, s. 53.

The affidavit must not be entitled in a cause.

A prosecutor may authorise another to sue out a certiorari in his name.

[249] The rule to remove proceedings by certiorari from before commissioners of sewers, is a rule nisi.

Previous to obtaining a certiorari, two bail shall enter into a recognizance before a judge, in 20*l.* each

Conditioned to appear, plead and try at the assizes. And after notice of bail,

The recognizance, certiorari, and indictment shall be filed.

in the said court of King's Bench, and at his or their own costs and charges to cause and procure the issue that shall be joined upon the said indictment or presentment, or any plea relating thereunto, to be tried at the next assizes to be held for the county wherein the said indictment or presentment was found, after such certiorari shall be returnable, if not in the cities of London, Westminster, or county of Middlesex; and if in the said cities or county, then to cause or procure it to be tried the next day after wherein such certiorari shall be granted, or at the sitting after the said term, if the court of King's Bench shall not appoint any other time for the trial thereof; and if any other time shall be appointed by the court, then at such other time, and to give due notice of such trial to the prosecutor, or his clerk in court, and that the said recognizance, taken as aforesaid, shall be certified into the said court of King's Bench, with the said certiorari and indictment to be there filed, and the name of the prosecutor (if he be the party aggrieved or injured), or some public officer, to be endorsed on the back of the said indictment; and if the person prosecuting such certiorari, being the defendant, shall not, before allowance thereof, procure such manucaptors to be bound in a recognizance as aforesaid, the justices of the peace may and shall proceed to the trial of the said indictment at the said sessions, notwithstanding such writ of certiorari so delivered. And by section 4. it is enacted, that in any of the vacations, writs of certiorari may be granted by any of the justices of the King's Bench, whose names shall be endorsed on the said writ, and also the name of such person at whose instance the same is granted, and the party or parties indicted, prosecuting such certiorari, shall, before the allowance of such writ or writs of certiorari, find sureties in such sum, and with such conditions as are before mentioned. And by the 8 & 9 W. 3. c. 33. is enacted, that the party prosecuting any certiorari, to remove any indictment or presentment from the quarter or general quarter sessions of the peace, may find two sufficient manucaptors, who shall enter into a recognizance before any one of his majesty's justices of the court of King's Bench, in the same sum, and under the same condition as is required by the said act, whereof mention shall be made on the back of such writ, under the hand of the justice taking the same, which shall be as effectual and available to all intents and purposes, to stay or supersede any further proceedings upon any indictment or presentment, for the removal of which, the said writ of certiorari shall be granted, as if the recognizance had been taken before any one of the justices of the peace of the county or place where such indictment is found, or presentment made; and also it shall be added to the condition of every recognizance, taken by virtue of this and the said act, that the party or parties prosecuting such writ of certiorari, shall appear from day to day in the said court of King's Bench, and not depart until he or they shall be discharged by the said court.

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And the parties are to appear in court until he or they be discharged.

By 5 Geo. 2. sureties shall enter into a recognizance in 50l.

Conditioned to prosecute, &c. at the applicant's own costs.

By 5 Geo. 2. c. 19. s. 2. it is recited, that whereas divers writs of certiorari had been procured to remove judgments or orders, in hopes to discourage and weary out the parties to such orders, &c. And then it is enacted, that no certiorari shall be allowed to remove any such judgment or order, unless the party prosecuting the certiorari before the allowance thereof, enter into a recognizance, with sufficient sureties, before a justice of the county or place, or before the justices at the sessions where such judgment or order shall have been given or made, or before a justice of the King's Bench, in 50l., with condition to prosecute the same, at his own cost and charges with effect, without wilful delay, and to pay the party in whose favor the judgment or order was made, within a month after the same shall be confirmed, his full costs to be taxed according to the course of the court where such confirmation shall be. And if he shall not enter into such recognizance, or shall not perform the conditions, justices may proceed and make such further order for the benefit of the party for whom the judgment shall be given, in such manner as if the certiorari had been granted.

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The principal should join with

2. *REX v. BOUGHNEY*. E. T. 1791. K. B. 4 T. R. 281.
Two persons having entered into recognizance to prosecute with effect, &c. obtained a certiorari to remove a conviction on the Conventual Act, 22

Car. 2. c. 1. it was moved that the writ should be set aside, upon the ground that the defendant had not given the security required by the 5 Geo. 2. c. 19. s. 2. the principal not having joined in the recognizance. Against this objection it was insisted, that by the 5 Geo. 2. it was not necessary for the person convicted to give security, it being sufficient if the party who prosecuted the *certiorari* did so; and that according to the practice of the crown-office, two sureties only were sufficient. But the Court thought the objection well founded, and set aside the writ.

3. REX v. DUNN. E. T. 1799. K. B. 8 T. R. 217.

A conviction under the 5 Anne c. 14. against the defendant, an unqualified person, for killing game, being removed by *certiorari* into this court; it appeared, that previous to its removal, the defendant had entered into a recognizance with two sureties, each in 25*l*. On motion to quash the *certiorari*, on the ground that no recognizance had been entered into as required by the 5 Geo. 2. which enacts that no *certiorari* shall be allowed to remove any judgment, &c. unless the party prosecuting such *certiorari*, &c. shall enter into a recognizance with sufficient sureties, &c. in the sum of 50*l*. and that the statute was not complied with by a recognizance of two persons, in 25*l*. each: the Court adopted this opinion, and said: there ought to have been a single recognizance of the defendant, and two sureties in 50*l*. and that the recognizance taken in 25*l*. each was not sufficient.

4. It is enacted by the 38 Geo. 3. c. 52. s. 1. that nothing therein contained shall extend to enable any person to prefer any bill of indictment for any offence committed within the county of any city, &c. to the jury of such next adjoining county as aforesaid, or to remove any indictment, &c. except the person preferring such bill, or applying for such removal, shall enter into a recognizance before the Court where such bill shall be preferred; or the Court or magistrate, to whom such application shall be made, in 40*l*. conditioned to pay the extra costs attending the prosecuting for such offence, in such next adjoining county, provided the Court before whom the trial is had, shall be of opinion that he ought to pay the same.

5. REX v. NOTTINGHAM. M. T. 1803. K. B. 4 East. 208; S. C. 1 Smith. Rep. 31.

This was an indictment against the defendant for an assault, originally preferred and found at the sessions for the city and county of the city of Lincoln, which was afterwards removed by *certiorari* into this court, and tried in the city of Lincoln, at the assizes for the county, and the defendant was found guilty. A motion was now made for a rule to show cause why the conviction should not be quashed, upon the ground that by the 38 Geo. 3. c. 52. s. 12. it was required, that before the trial could be had in the adjoining county to which the offence was committed, the party should enter into a recognizance in the sum 40*l*. conditioned to pay the extra costs attending the prosecution for such offence in the next adjoining county, and in this case no such recognizance had been entered into. The court intimating that the clause referred to did not apply to the case before them of a removal by *certiorari*; but only to cases of offences committed within the jurisdiction of courts of a limited jurisdiction, where the indictment was immediately preferred before the jury of the county next adjoining, under the particular provisions of that act; and that there was nothing in the 2d and 3d clauses of the act which applied to the case of a removal by *certiorari* into the court of K. B. in order to send the indictment down to be tried by the assizes; it was contended that the 12th clause of the act applied to the whole of the former clauses; that in the first clause the case of a removal by *certiorari* is mentioned; and that the proviso in the 12th, there is a reference also to that case, the words being, that "nothing in the act should extend to enable any person to prefer any bill or to remove any indictment, &c. except the person preferring such indictment, or applying for such removal shall enter into a recognizance."

Sed Per Cur. That only relates to removals from courts of oyer and terminer, as mentioned in the act. Otherwise, it would considerably abridge this court of its authority to remove by *certiorari*—Rule refused.

And the 5 G. 2. was not satisfied by each of the sureties becoming bound in 25*l*. each.

But now by 38 Geo. 3. s. 1. shall enter into a recognizance in 40*l*.

And where an indictment had been originally preferred and removed into the court of King's Bench by writ of *certiorari*, and then sent down to be tried by a jury of the county at large, it is not necessary that the party removing it should enter into a recognizance in 40*l*. under the 38 Geo. 3. c. 52. s. 12.

A *certiorari* must not be double.

2. *Of the sufficiency of the sureties.*

If the persons offering to be sureties appear to be worth the requisite amount, the justices cannot refuse them; 2 Hawk. P. C. c. 27. s. 50; Com. Dig. Certiorari, B; and if several persons be included in the indictment, and some of them find sureties and the others not, it is said that the proceedings as to the first will be valid; 2 Hawk. P. C. c. 27.

3. *Recognizance on, when discharged*

It may be stated as a general rule, that the same causes that have been already mentioned as operating to discharge other recognizances, hold equally as reasons for the exoneration of the parties upon removal of indictments by certiorari; see ante, vol. 3. p. 247.

VII. AS TO THE FORM.

(A) OF THE STAMP.

Formerly a writ of certiorari required a 20s. stamp; 48 Geo. 3. c. 149; 55 Geo. 3. c. 184. But that duty is repealed by the 6 Geo. 4. c. 45.

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(B) GENERAL REQUISITES.

(a) *It must not be double.*

TYSON v. HILLIARD. H. T. 1704. K. B. 1 Salk. 269; S. C. 2 Lord Raym. 1122.

A certiorari must not be double

In error, the want of an original was assigned; and a certiorari being awarded, the original was returned with continuances. But the Court held the certiorari and return impertinent as to the continuances.

(b) *It must be substantially consistent with the record.*

A certiorari to remove proceedings had under a private act of parliament, must show the foundation of the inferior jurisdiction.

1. REX v. THE MAYOR, &c. OF LIVERPOOL. T. T. 1768. K. B. 4 Burr. 2244.

On a certiorari to remove an inquisition, and a verdict thereon taken before the Lancashire, by virtue of a private act of parliament (8 Ann. c. 25.) intituled, "An act to enable the corporation of Liverpool to make a grant to Sir Cleeve Moore, bart., for liberty to bring fresh water into the said town of Liverpool," upon which said inquisition the jury determined upon their oath, that there should be paid, allowed, and given amongst the several owners and occupiers of land, soil, and ground, in the said inquisition particularly mentioned and described, the sum of 176*l.* 4*s.* 9 1-4*d.* in the several proportions therein mentioned; and which said inquisition and verdict thereon had been carried into, and were then kept amongst the records and writings in the said town of Liverpool. These proceedings having been returned, a motion was made for quashing them, on the following objections—1st. It does not appear that the lands were necessary for the conveyance of the fresh water through them. 2dly. The damages were assessed aggregately. 3dly. No proper notice was affixed and given, as is requisite. The Court said, that notice ought to have been given to the parties interested in the lands; and that it ought to have appeared upon the inquisition, and also "that the jurisdiction ought to appear."—Now, without notice he had no jurisdiction. The sheriff was to give the notice; and he should have shown it. We cannot intend an inferior jurisdiction, unless it be properly set out. If it had been properly set out "that 20 days' notice was given, pursuant to the act," then the inquisition and judgment had been conclusive against the owners of the lands. Rule absolute.

And be consistent with the record it is intended to remove hence, if it professes to move an indictment it will not remove a conviction on that indictment.*

2. REX v. DIXON. H. T. 1703 K. B. 1 Salk. 150; S. C. 2 Lord Raym. 971.

Dixon was indicted for selling five yards of muslin, and affirming it to be worth 4*s.* a yard, when in fact it was really worth but 2*s.* 6*d.* a yard, and a certiorari was brought to remove it, but not served till after conviction—the Court said, it was altogether irregular; and that by this certiorari they could by no means remove the indictment; for if a person takes out a certiorari to remove an indictment, and will not use it till after conviction, or the jury has

* So if it describe the indictment to be taken before seven justices, when the proceeding itself mentions eight; see Cro. Jac. 254; Yelv. 42; 2 Hawk. P. C. c. 27. s. 76; or if a different judge be named before the words *others his companions*, than who appears on the record; see 1 Sid. 448; 1 Rol. Abr. 753; or if the magistrates be denominated *our justices*, when the indictment was taken in a former reign, the variance is fatal; 1 Rol. Abr. 754; 2 Dyer. 105-6; Yelv. 212; 2 Hawk. P. C. c. 27. s. 76.

been sworn, he loses the benefit of it; and for that the writ was quashed, and a new one granted to remove the indictment, and conviction thereon.

3. ANON. M. T. 1702. K. B. 7 Mod. Rep. 97; S. C. 3 Salk. 79; S. C. 1 Salk. 144.

A *certiorari* issued to remove orders made concerning *foreign salt*, and the orders returned concerning *salt in general*. The Court held, they were not well removed for a special *certiorari* cannot remove general orders; though a general *certiorari* will remove special ones.

4. BARNADISON V. FOWLER. H. T. 1703. K. B. 10 Mod. Rep. 204; S. C. 1 Gilb. 125.

The Court held, that if a *certiorari* issue to return the record of a suit between A. and B. and the return is of a record between A. and B. and C., the record is not removed.

5. ANON. E. T. 1702. K. B. 3 Salk. 80.

A *certiorari* to remove an indictment, stated it to be for feloniously stealing two horses, and the indictment was for stealing a horse.

for stealing two horses, and that certified was for one it is ineffectual.

Per. Cur. Nothing is before the Court, neither have they any warrant to proceed in this case, for there is a variance between the indictment and the writ.

6. ANON. M. T. 1720. K. B. Stra. 116.

A *certiorari* was awarded to remove a conviction of a forcible entry, and detainee against A. and his wife—the conviction returned was against A. only; and for this variance the *certiorari* was quashed.

2. REX V. BROWN. M. T. 1699. K. B. 1 Lord Raym. 509; S. C. 1 Salk. 146.

A *certiorari* was granted to remove all indictments against B. C. and D. and they returned one indictment against B. another against C. and another against D. in which they were indicted singly. And on a motion to quash the indictment in which B. was indicted; it was held, that it was not removed because the indictment in which B. was indicted alone, was not the indictment intended by the *certiorari*, which means indictments in which B. C. and D. were jointly indicted. It would have been otherwise, if the *certiorari* had been for other matters in the indictment mentioned.

(c) *It must be specially framed after a verdict.*

It seems that a *certiorari* to remove a record after verdict must be expressly framed for that purpose; see 2 Lord Raym. 938. 971; 13 East. 417. note; 2 Hawk. P. C. c. 27. s. 75.

(d) *It need not show the offence to be contrary to statute.*

REX V. HAYES. T. T. 1730. K. B. 1 Stra. 845.

Per. Cur. A *certiorari* to remove an indictment need not describe whether the offence be or be not against the form of the statute; hence a *certiorari* to remove all indictments will remove one for forgery on the statute.

See 2 Hawk. P. C. c. 27. s. 81.

need not describe the offence to be contrary to the form of the statute &c.

(e) *When and by whom to be signed.*

REGINA V. WHITE. E. T. 1705. K. B. 1 Salk. 150. S. P. ANON. T. T. 1687. K. B. Comb. 88.

A *certiorari* to remove an order of sessions was superseded, because it issued two days before the *fiat* was signed by a judge.

Per. Cur. If it be to remove an indictment, both *certiorari* and *fiat* ought to be signed; if to remove an order, the *certiorari* need not be signed, but the *fiat* must.

† And a material variance in the names or additions is fatal, as if a wrong surname; see 1 Salk. 264; 1 Rol. Abr. 754; 2 Hawk. P. C. c. 27. s. 81; or christian name be inserted; see Cro. Jac. 477; 2 Hawk. P. C. c. 27; or if a writ say knight and baronet, and the record be baronet only; Cro. Jac. 633; 2 Hawk. P. C. c. 27. s. 81; or if the addition either of the place or trade vary; see 1 Sid. 193; Dyer. 173; 1 Rol. Abr. 753; 2 Hawk. P. C. c. 27. s. 81; but if the mistake be only in the spelling, and the sound remain unaltered, as *Bird* for *Burd*, or *Shelbury* for *Shelbery*, it will not be fatal; see Cro. Eliz. 172; 1 Rol. Abr. 797; 2 id. 329; 2 Hawk. P. C. c. 27. s. 81. And it seems that even the omission of the addition will not vitiate; see 2 Hawk. P. C. c. 27. s. 81.

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So a *certiorari* to remove an order relating to foreign salt, will not remove one relating to salt generally.

So a *certiorari* to remove an indictment against A., instead of A. and B

Or an indictment And the same rule applies where more defendants are named than appear on the record.†

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So if it be to remove all proceedings against several persons, it will only remove the proceedings against all of them jointly. A *certiorari* to remove an indictment on the statute,

Where the *certiorari* is to remove orders, the *fiat* only is signed by the judge; but where it is to remove indictments, both the writ and the *fiat* must be

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signed by him.*

The writ must be regularly directed to the persons before whom the proceedings were originally taken.†

But a *certiorari* to remove an order of two justices may be directed to the sessions.

And the misdirection of a *certiorari* cannot be taken advantage of after the record has been returned.

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A statute taking away a *certiorari* does not take it from the crown unless expressly named.

(f) *To whom to be directed*

1. REGINA V. JAY. E. T. 1708 K. B. 1 Mod. Rep. 172.

In the beginning of this term, a writ of certiorari was quashed, because it was directed to the justices assigned to the peace, omitting the word *keep*.

2. REX V. THE INHABITANTS OF WARMINSTER. M. T. 1723. K. B. 4 Stra. 470.

The sessions returned an order of two justices for the removal of J. S. whereby it appeared, that after stat. 1. Jac. c. 17. and before stat. 3 and 4. W. and M. c. 11. J. S. had been hired in the parish of Warminster, and had lived there as a servant for 40 years, which the two justices adjudged had gained him a settlement. And it was moved that the certiorari should have gone to the two justices, and not to the sessions, because it did not appear any act had been done at the sessions, either to confirm or reverse the order. But the Court decided that the order was well returned by the sessions, and said, it had been so determined already, for the justices are supposed to return all orders they make to the session, where they are to be recorded.

3. DANIEL V. PHILLIPS. H. T. 1792. 4 T. R. 499.

On motion to quash a certiorari issued to remove a cause from the borough court of C., it was objected that the writ was directed to the mayor, commonalty, and burgesses, which was the name of incorporation; instead of to the mayor, recorder, and town clerk, before whom the court was holden. But the Court were of opinion, that third persons could take no objection, the record having been returned into the court.

(g) *How indorsed.*

The writ of certiorari is always indorsed describing at whose instance it was issued; and when issued in term time, the words "by rule of Court" are added; see 5 and 6 W. and M. c. 11 s. 2.

(h) *How delivered.*

This writ should be delivered to the chairman of the sessions in open court, or other chief judge of the tribunal, though if it appear that it came to the knowledge of the justices or judges, even through other means, it must be obeyed by them. In practice it is usually delivered to the clerk of the peace, or clerk of assize; see 2 Hawk. P. C. c. 27. s. 56; 1 East. P. C. 299. 301.

VIII. EFFECT OF STATUTES RESTRAINING THE COURTS GRANTING A CERTIORARI.

1. REX V. —. E. T. 1815. K. B. 2 Chit. Rep 136. S. P. REX V. DAVIES. E. T. 1794. K. B. 5 T. R. 626 REX V. THE INHABITANTS OF BODENHAM. T. T. 1774. K. B. Cowp. 78.

The court held in this case, that where a statute deprives parties of the privilege of removing proceedings by *certiorari*, it only applies to the subject, and not to the crown, unless the crown be expressly mentioned. See 5 T. R. 626; Burn, J. tit. *Certiorari*.

2. REX V. ALLEN. E. T. 1812. K. B. 15 East. 333.

The question which arose in this case was, whether the 48 Geo. 3. cap. 74.

* So a *certiorari* to remove a recognizance when the defendant is in actual custody must be signed by the chief justice, or in his absence, by one of the judges of the court from whence it is awarded; see 1 & 2 P. & M. But if it be taken out in vacation and tested; as it may be of the preceding term, the *fiat* must be signed some time before the assign day of the subsequent term, or the whole will be irregular; see 2 Hawk. P. C. c. 27. s. 87.

† Or in some cases it may be directed to the officer, known to have the actual custody of the record; see Dyer. 163; 12 Hawk. P. C. c. 27. s. 38. And if the person who ought to certify the record as a justice of the peace, or judge who had taken recognizance, a judge at Nisi Prius who has taken a verdict, or a coroner who has taken an inquest, happen to die while it remains in his custody, the *certiorari* may be directed to his personal representatives, who must certify; see Keb. 750; Dyer. 163. a; 2 Rol. Abr. 629; 2 Inst. 214. So it may be directed to a justice of assize, to certify to a record of assize, taken before his companion in his absence; see 2 Hawk. P. C. c. 27. s. 38. When the *certiorari* is intended to remove indictments or recognizances from the sessions, they are directed either to the justices generally, or to some of them in particular and not to the *custos rotulorum*, though it seems that it may be returned by him, especially if he style himself a justice of the peace; see 2 Hawk. P. C. c. 27. s. 40.

s. 15. giving to the party grieved an appeal to the sessions against a conviction by justices of the peace, for penalties incurred in respect of the duties on malt, and empowering the sessions "to hear and finally determine of and concerning the truth of the facts, and merits of the case in question, *between the parties* to such conviction respectively;" and after enabling the sessions to amend defects of form, enacting, in the same clause, that no certiorari shall be allowed to *set aside the determination of the sessions*; and providing, that upon such appeal, the sessions shall re-hear, re-examine, and re-consider the truth of the facts, and merits of the case, &c. and re-examine the same witnesses as before, and no other, precluded the crown from removing the conviction, and the order of sessions quashing the same by certiorari. The court said: it is clear, that unless the act has clearly said so, the power of the crown is not restrained. Now, there are no words expressly taking it away. Thus was it the clear intention of the legislature so to do. The subject had, of right, no appeal from the conviction, unless it were given him by act of parliament; but the crown, as well as the subject, had a right to remove the proceedings by certiorari, unless that right were taken away. Then the 15th clause seems to contemplate the condition of a defendant, and of a defendant only, in having the case revised. It recites the doubt, whether he had any appeal from the conviction, and it gives the appeal, and the right to have the witnesses heard *de novo* before the sessions, but says that no certiorari shall be allowed. The fair meaning of which is, that the party convicted shall have an appeal, in which the merits of the case shall be re-considered, but that he shall no longer have the benefit of the writ of certiorari. This leaves the right of the crown untouched.

3. *REX v. TINDAL*. H. T. 1754. K. B. Cited 15 East. 339.

A motion was made for a certiorari to remove the conviction of a glass-maker. An objection was raised on the statute 13 Geo. 2. c. 18. s. 5. which was passed for preventing vexatious delays and expense occasioned by suing forth writs of certiorari, it enacts, that none shall be granted to remove any conviction, unless applied for within six calendar months after, and unless it be duly proved, on oath, that the party suing forth the same has given six days' notice, in writing, to the convicting justices. These expressions were relied upon by the court, as showing that the legislature could not have intended to bind the king, to whom no vexation or delay could be imputed.

4. *REX v. TERRET*. M. T. 1788. K. B. 2 T. R. 735.

The statute 12 Anne, st. 2. cap. 33. s. 6. enacts, that incorrigible rogues are to be committed by one justice till the next sessions, when they are to be whipped three times, and kept to hard labour for such further time as the sessions shall think fit. The statute 13 Geo. 1. cap. 23. s. 6. which creates several penalties for offences therein specified, to be recovered before two justices, gave an appeal to the sessions, but interdicted a removal by certiorari.

The 8th sect. 13 Geo. 1. directs that persons offending against its provisions shall be deemed, under the statute of Anne to be incorrigible rogues. The statute of Anne was afterwards repealed by the 17th Geo. 2. cap. 5. but directed that persons offending against the 13 Geo. 1. should be deemed incorrigible rogues within its provisions; the latter, however, does not take away the right to a certiorari.

The defendant had been convicted under the 13 Geo. 1. c. 23. against which conviction he had appealed to the sessions, part of which was confirmed, and the other part quashed. In support of a rule for a certiorari, it was contended, that all the proceedings subsequent to the conviction before the justice, were under the 17 Geo. 2. which did not take away the certiorari; and the provisions in the statute of the 13 Geo. 1. which interdicts the removal by certiorari, could not be incorporated in an act passed subsequently. Against the rule it was argued, that the proposition advanced in favour of the rule, was in effect saying, that no certiorari could be taken away, but by the same act of parliament which inflicts the punishment; a doctrine which had been expressly denied in the *King v. Abbott*, 553. n. 4th edit. The court were clearly of opinion, that as far as respected the proceedings under the 17 Geo 2. c. 5. the certio-

And where a statute in specified terms declares that the proceed ings shall not be removed by certiorari, this does not prevent its issuing at the suit of the crown.

[258] The certiorari to remove a conviction of a glass-maker on the 13 Geo. 2. c. 18. s. 5. which was there fore holden not to be taken away from the crown, though it be from defendant.

And where a statute creating an offence forbids the removal of a conviction under it by certiorari, and a subsequent one varying the punishment contains no such interdiction, the clause in the latter act cannot be incorporated in the former, so as to affect the party's right to a certiorari under the last act,

[259] rari was not taken away; but that with reference to the 13 Geo. 1 they were removable by *certiorari*.
So the 17 G. 3. takes away the writ of *certiorari* only from the offences for the first time created by the 22 G. 2, does not apply to those created by the 12 G. 1.

5. *In re KAY*. E. T. 1822. K. B. 5 B. & A. 773; S. C. 1 D. & R. 436.
The statute 12 Geo. 1. makes it an offence for clothiers, and other manufacturers, to pay the wages of their workmen in goods instead of money. The statute 22 Geo. 2. creates several new offences, and extends to silk manufacturers; and the 17 Geo. 3. takes away the *certiorari* upon convictions under the 22 Geo. 2. A silk manufacturer having been convicted under the 12 Geo. 1. and 22 Geo. 2. the question arose, whether he was deprived of a writ of *certiorari* by force of the 17. Geo. 3? The court were of opinion, that as the 22 Geo. 2. makes a variety of new substantial offences; in addition to those created by the 12 Geo 1., the statute 17 Geo. 3., which only recited the different provisions of the 22 Geo. 2., does not attach to the 12 Geo. 1.; and, therefore, that the *certiorari* might be obtained.

6. *REX v. CASSON*. T. T. 1823. K. B. 3 D. & R. 36.

But where an order was made by two justices, and confirmed by the sessions, professedly under the authority of, but (as was alleged) without proving the formalities required by an act, which prohibits the removal by *certiorari* into this court of any proceedings had in pursuance of it, the Court held that the *certiorari* was still taken away.
Professedly under the statute 13 Geo. 3. c. 78. s. 80 which prohibits the removal, by *certiorari*, into this court, of any proceedings had in pursuance of that act, an order was made by two justices, and confirmed by the sessions, for diverting a road, without the consent of the proprietors of the land through which the new road was to be carried. The order did not specify the names of those proprietors; but, after the different necessary averments, proceeded as follows: "We do hereby order that the said highway be diverted and turned through the lands, and according to the line marked A. in the plan hereto annexed, and that the surveyors for the highways for the said parish of F., where the old road lies, do forthwith proceed to treat, and make agreements for the recompence to be made for the said ground, and for the forming the said new road, &c. in such manner, and with such approbation, and by pursuing such measures and directions, in all respects, as are warranted and prescribed by the statute made in the 13th year of the reign of his majesty George the Third, for the amendment and preservation of the highways, and every subsequent act or acts relating thereto: and we do order an equal assessment, not exceeding the rate of 6d in the pound, to be made, &c. in the said parish, and that the money arising therefrom be paid and applied in making such recompence and satisfaction as aforesaid, pursuant to the directions of the said acts, &c." A *certiorari* had been obtained by defendants, which it was now moved to quash, *quia improvide emanavit*, and to award a *procedendo*. It was however urged, that the writ lay at common law; the above order, though it purported to be a proceeding in pursuance of the 13 Geo. 3. c. 78. s. 19. not being so in fact, inasmuch as the statute requires that the names of the owners of the lands through which the new road was to be carried, should be set forth in the order, whereas that had not been done in this case. But the court said: this is manifestly a proceeding under the act of George the Third referred to, and though it may be somewhat informal, yet it is, in fact such a proceeding. The statute appears to be expressly mentioned, by the very words used by the justices in the order; *vide supra*. Whether they have provided formally, or informally, is a matter with which this court has no authority to inquire, because the writ of *certiorari* is taken away; though we doubt very much, whether, under that act, it is an essential part of the order, that the justices should specify the names of the owners of the land through which the road is to pass, the act containing no intimation whatever in that respect, though the form of the order given in the schedule to the act leaves a blank for the names of such individuals, the form, in that respect, being only directory. There might, perhaps, have been some weight in an argument, that the statute only authorises a conditional order, whereas this is absolute; but even then, that would only make that part of the order void. We are, therefore, of opinion, that the rule for quashing the writ of *certiorari*, and awarding a *procedendo*, must be made absolute.—Rule absolute. See 3 D. & R. 6; 3 B. & A. 414; 55 Geo. 3. c. 68 s. 2.

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7. *REX v THE MAYOR OF LIVERPOOL*, *in re PRICE*. T. T. 1823. K. B. 3 P. & R. 275.

This was a motion for a certiorari to remove a conviction under 50 Geo. 3. So upon the v. 73. The act entitled, "An act to alter, explain, and amend the laws now in force respecting the trade of bakers residing out of the city of London, or the liberties thereof, or beyond 10 miles of the Royal Exchange" It begins by reciting the title of an act of 53 Geo. 2. c. 29. (by the 36th and 37th sections of which a certiorari is expressly taken away, and an appeal given to the sessions); another, of the 3 Geo. 3. c. 6., and another of 13 Geo. 3. c. 62; and then it proceeds, "And whereas some of the regulations and provisions, contained in the said several acts, have been found defective, and, in some respects, injurious to the bakers and the public, and it is therefore expedient that the same should be altered and amended, and more effectual provisions made for ascertaining the due weight of bread, and for the better observance of the Lord's day, commonly called Sunday." The different sections correct the evils complained of in the enacting part. The question which now arose was, whether section 5. virtually incorporated ss. 36 & 37 of 31 Geo. 2. c. 29? It is as follows: "That all powers, authorities, provisions, directions, penalties, forfeitures, clauses, matters, and things contained in the several acts now in force, not altered or varied by any of the provisions of this act, as far as the same can be made applicable, and can be applied for the carrying into execution the purposes of this act, shall be used, exercised, and put in execution for enforcing the regulations, provisions, and directions of this act, in such and the same manner as if the same were herein contained. and were at length re-enacted, and made part of this act; and the penalties by this act inflicted shall be recovered and applied in like manner as the penalties by the said several other acts inflicted are directed to be recovered and applied." It was contended, that although sect. 5. of the 50 Geo. 3. c. 73. was a general clause of reference to the 31 Geo. 2.; the 3 Geo. 3., and the 13 Geo. 3. yet it might be satisfied by incorporating the general, without including the special provisions of those statutes, one of which took away the certiorari, and the other gave an appeal. *Sed per Cur.* The former acts are not in terms repealed except so far as they are expressly altered by the 50 Geo. 3. Now the 50 Geo. 3. does not make any alteration as to what had been previously established by 31 Geo. 2. c. 29. ss. 36 & 37., which give the appeal, and take away the certiorari. The clause itself is not altogether free from ambiguity; some obscurity existing by the introduction of too many words. Yet it was clearly the intention of the legislature to leave the provisions of the former acts, as they regard the appeal and certiorari, in full force.—Rule refused. See 3 B. & A. 414. 596; 2 T. R. 29. 198. 510; 1 D. & R. 436.

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A certiorari removes all proceedings which have taken place between the teste and return, though the proceedings originally commenced after the teste. All proceedings subsequent to the return of the certiorari are given to the officer to the jury as sitting in his judicial capacity, are void.

IX. AS TO ITS OPERATION.

(A) AS TO WHAT PROCEEDINGS ARE REMOVED BY, IN RELATION TO THE STATE OF THE CAUSE.

REX v. BATTAMS H. T. 1801. K. B. 1 East. 298. S. P. SMITH v. CROSS. H. T. 1702. K. B. 7 Mod. 138; S. C. 12 Mod. 643; S. C. 1 Saik. 148; S. C. 2 Lord Raym. 836; S. C. 3 Salk. 79; S. C. 2 Lord Raym. 846. S. P. ANON. M. T. 1709. K. B. 2 Lord Raym. 1305.

A certiorari to remove an indictment from the sessions being tested before the indictment was preferred, was objected to on that ground, inasmuch as it could not operate to remove that which had no existence at the time. The argument was, however, considered untenable.

(B) OF ITS INFLUENCE AS A STAY OF PROCEEDINGS.

1. REX v. BATTAMS. H. T. 1801. K. B. 1 East. 298. P. S. CROSS v. SMITH. H. T. 1702. 1 Salk. 148; S. C. 2 Lord Raym. 836.

* Provided the directions of the 21 Jac. 1. c. 8. s. 7. have been complied with, by entering into the proper recognizances previous to the removal; see 2 Hawk. P. C. c. 27. s. 59. But as a certiorari operates only as a discharge from the time of its being actually served, whom, &c. and not from the time of its being issued; if the writ be not delivered before the jury are sworn to try the issue, the justices may proceed; see 1 Salk. 144. 150; 2 Hawk. P. C. c. judicial capacity, are void.

It was argued in this case that a writ of certiorari had not been regularly delivered to the justices so as to bind them to obey it; although it appeared that the certiorari had been produced in court, and had come to their knowledge. The court however, said, that they could not agree with such a position; that no doubt the court were bound to yield obedience to it, and that all subsequent proceedings in the matter were void.

Therefore, after certiorari to remove inquisition of forcible detainer, the justices cannot award restitution.

2. *SIR GODFREY KNELLER'S*. E. T. 1693. K. B. 1 Salk. 151.

Per Cur. If there be a forcible detainer, and an inquisition taken, and then a certiorari to remove the inquisition, and afterwards a new forcible detainer, the justices may, notwithstanding the certiorari, record the force, but they cannot proceed to award restitution; so if after the inquisition, and before the certiorari, there had been a forcible detainer, the justices might have recorded the force; but all proceedings upon such inquisition are stopped by this writ.

3. *Rex v. NASH*. M. T. 1702. K. B. 1 Salk. 147; S. C. Lord Raym. 969.

See *Endries* 37 S. P. *MORLEY v. STACER*. M. T. 1703. K. B. 6 Mod. 83.

But a certiorari is not a supersedeas to an execution issued before the suing out of the certiorari.

The defendant was convicted of deer-stealing, and a warrant was awarded, &c. He accordingly distrained, and then came a certiorari to remove the conviction; and after the record removed, the constable sold the goods, but would not part with the money or return the warrant. And the court held, 1st, That the constable might well proceed in the execution after the certiorari, because it was begun before, and the certiorari no more stays it than a writ of error of a judgment in C. B. stays the execution of a fieri facias already begun to be executed in the K. B.

4. *ANON.* T. T. K. B. 1702. K. B. 7 Mod. Rep. 39.

After removing an indictment by certiorari, no motion can be made in arrest of judgment, until the defendant has appeared. By the defendant's removal of a cause by certiorari out of an inferior court, the

Per Cur. It shall be a rule for the future, that upon the moving of indictments by certiorari, we will not hear a motion in arrest of judgment until the defendant has appeared.

(C) AS REGARDS THE SURETIES BELOW.

TAYLOR v. SHAPLAND. M. T. 1814. K. B. 3 M. & S. 328.

The question which arose in this case was, whether upon removal of a cause by certiorari out of the court of the honour of Gloucester, the pledges below were discharged, by putting in and perfecting bail above. The court held that they were, and said; is it not contrary to one of the first principles of law, that a person shall be *his uxoris* in the same matter. The defendant here would be so, if his bail below remain liable after he has put in and perfected bail above. The distinction seems to be, that where the plaintiff removes, the bail are immediately discharged; but where the defendant removes, the bail are not immediately discharged; but there is another condition, that bail above be put in and perfected.

pledges below are discharged, provided bail be put in and perfected.

(D) EFFECT OF PROCEEDINGS AFTER DELIVERY OF THE WRIT.

If an inferior or jurisdiction proceeds after a certiorari, an attachment lies. As where commissioners of sewers impose a fine.

1. *THE QUEEN v. THE MAYOR, &c. OF CARLISLE*. T. T. 1701. K. B. 7 Mod. 38.

An attachment was granted against the Mayor for proceeding after a certiorari had been delivered to him. *See* Sir T. Raym. 186; 1 Vent. 66; Yelv. 32; 2 Hawk. P. C. c. 27. s. 62.

2. *SMITH AND OTHERS v. COMMISSIONERS OF SEWERS*. H. T. 1667. K. B. 1. Mod. 44; S. C. 1 Vent. 66; S. C. 2 K. 635; S. C. T. Raym. 186.

In this case the commissioners were brought into court by attachment, because they proceeded to fine a person after a certiorari had been delivered.

3. *REX v. BURY*. T. T. 1778. K. B. Cited 1 Doug. 194.

And the officer cannot refuse to obey it, under pretence of not being paid.

Upon a rule to show cause why an attachment should not issue against the defendant, who was clerk of assize on the Norfolk circuit, for not obeying a writ of certiorari to remove an indictment for murder, and a special verdict founded upon it. The defendant insisted, that he had a right to retain the record till he should be paid his fees for drawing, ingrossing, &c. which the attorney for the prisoner refused to do, on the ground of their being exorbitant. However, on the attorney's undertaking to pay as much as should, on a ref-

erence to the master, be reported to be due, the record was returned into his fees in the court, upon which the rule was discharged. But Lord Mansfield said: he should be very unwilling to determine that a clerk of assize has a lien on the records of the Court for his fees, for that he foresaw great inconvenience from such a doctrine.

(E) EFFECT OF ITS BEING REMANDED.

If the indictment be removed by certiorari after issue, [and] afterwards remanded, the inferior courts may proceed to trial, in the same way as if the writ had never been awarded; 2 Hawk. P. C. c. 27. s. 61; Williams, J. certiorari VII.

X. AS TO ITS RETURN.*

(A) WHEN NECESSARY.

On a certiorari, the justices at sessions must return the proceedings, although no recognizance has been entered into; 2 Hawk. P. C. c. 27. s. 47.

(B) FORM OF THE RETURN.

(a) General requisites.

1. **REX V. THE INHABITANTS OF SROW BARDON.** M. T. 1735. K. B. Ca. Temp. Hard. 173.

Motion to quash an order of removal returned on a certiorari exception, that the order was returned on paper; the Court said, such a return must not be on paper.

2. **REX V. THE PARISH OF ST. MARY, DEVISES.** E. T. 1702. K. B. 1 Salk. 147.

On a certiorari to remove an order, the return was, "the tenor of which follows in these words," when it should have been, which order follows in these words, and for this reason it was quashed, and on motion a new certiorari was granted.

3. **REX V. THE INHABITANTS OF HENNINGHAM AND FINCHINGFIELD.** M. T. 1737. K. B. And. 73; S. C. Burr. S. C. 112. 208.

In this case it was urged that the return to certiorari was insufficient, for that the orders are to remove "A. B. and E. his wife, and two daughters, and the children of A. B. and E. his wife," and certiorari is to remove all orders for the removal of A. B. and E. his wife, and the children of A. B. and Hob. 327. and Salk. 145. 452. were cited, and the return was for this reason holden bad.

4. **REX. V. BERRY** E. T. 1692. K. B. Carth. 223.

Indictment upon the statute 5 Eliz. for exercising a trade in a borough, not being bound apprentice to it; and upon a certiorari to remove it into B. R. the mayor returned, *Humillime certifico quod ad Sessionem pacis, &c. perjuatores presentatum existit quod billa sequens est vera*, viz. *Quod predict. Berry did exercise, &c.* The first exception was, that *billam sequens est vera* is naught; bad. *sed non allocatur*, as to that part of the return; 2d. Exception was, that there is no bill at all; for it is not said that it was presented by the jury.

Sed Per Cur. This is no return to the certiorari, for the writ commands to return an indictment, but this is none, therefore we cannot quash it, neither

* For the recovery of the former he has a proper remedy by action, and for the latter if not paid, the defendant may be remanded; see 3 Stra. 308; 2 Stra. 1262.

† If the person to whom the certiorari is directed do not make a return, then an *alias*, that is a second writ, then a *pluries*, that is a third writ, or *causam nobis significes* shall be awarded, and then an attachment; see Cromp. 116.

‡ But on parchment; see 1 Barnard. 113.

§ Since in the return, the record itself, or the tenor, or the tenor of the tenor, is to be certified according to the requisition in the writ; see F. N. B. 245; 3 Keb. 47; 2 Hawk. P. C. c. 27. s. 4; Bac. Ab. Certiorari. But a return of the tenor of an indictment from London is good by the charter of that city; see 1 Keb. 252; Sid. 153; 2 Hawk. P. C. c. 27. s. 21. And wherever the purport of a certiorari is not to proceed upon the record to be removed, but only to try an issue of null tiel record, it is sufficient to certify the tenor of the record whatever the words of the writ may require; see 3 Keb. 13; 1 Keb. 107; 2 Dyer. 186. b; 2 Hawk. P. C. c. 27. s. 71. And if any thing is inserted in the return by way of explanation or otherwise, which was not commanded, it will not vitiate, but be rejected as surplusage; see Williams, J. Certiorari VIII; 2 Salk. 493.

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The return
must be on
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And if the
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Or the omis
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bad.

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[265] can we suffer this return to be filed ; because it is insufficient. The mayor was ordered to amend the return. *Et per Cur.* A return, *quod humillime certifico*, is not good.

But where return to a certiorari for the removal of or ders, descri bing the payment of a rate for the repair of beacons, watch-houses were in decay or out of repair, it was held well enough.

5. THE CASE OF THE TOWN OF WINCHELSEA. T. T. 1681 K. B. T. Raym. 448. — A certiorari was granted to the mayor, jurats and commonalty of the ancient town of Winchelsea, in Sussex, to remove an order or decree made by them, who made this return; viz. That there have been time out of mind in Kent and Sussex, five ancient towns, viz. Hastings, Sandwich, Dover, New Romney and Hythe, which have been called Cinque Ports of the kingdom; and that in Sussex there are, and always have been, two other ancient towns called Rye and Winchelsea, which are members of the said Cinque Ports. That the said town of Winchelsea hath been time out of mind, incorporated by the name of Mayor, Jurats, and commonalty of Winchelsea. That all the said cinque ports, with their members have been time out of mind places for ordering provision, and preservation of shipping of the kings and queens of this kingdom of England for the time being; and that by reason of their situation upon or near the sea-shore, the inhabitants and residents thereof, as well for safe keeping the said towns, as of the said kingdoms of England, against foreign invasion of enemies, have always, and ought to keep beacons, watch-houses, and guards, night and day, as well by sea as land; and for better maintenance thereof, the said town of Winchelsea, in their Common Hall, used to make taxes and rates upon every inhabitant or occupier of house or or land, lying, or being within, the said town or liberties thereof, which said privileges were confirmed by Magna Charta. That 1 Mary. 32 Car. 2. they made a tax of 6d. per pound for the maintaining of the said beacons and watch-houses, according to a schedule annexed to the said tax, and that there was no other order or decree; and set out the schedule. And to this schedule was objected, that it is not set forth that the beacons or watch-houses were in decay or out of repair, and so the rate was unnecessary; but resolved, it is well enough; for 1st. It would be dangerous to expect till they became in decay; for then there must be no beacon till repaired, nor no watch-houses in the meantime, which would be dangerous for the place. 2d. It is to be presumed that the inhabitants will not tax themselves unnecessarily, and they do all concur in the taxation; and so the order was confirmed.

6. REX V. EATON. H. T. 1788. K. B. 2 T. R. 285.

So after a conviction has been returned to the sessions by the convicting magistrate, [266] and a certiorari sued out to remove it, annexing to the return a copy of the writ, is sufficient.

The return of a magistrate to a certiorari, to remove a conviction on the Deer Act, 16 Geo. 3. c. 30. was, that the defendant after the conviction, having entered into a recognizance to try his appeal at the next quarter sessions, he, the justice, had returned the record of the prosecution to the sessions, where it was filed of record; but he had annexed the copy to the writ. It was urged that the original ought to have been returned; but the Court said, the return was good, for, upon the defendant's entering into a recognizance to try the appeal, it was the duty of the justice to return the original record of the conviction to the sessions; and besides, a certiorari in this instance was improper, the party having appealed to the sessions, and thereby made his election according to the terms of the act.

(b) Of the Seal.

The return to a writ of certiorari ought to be sealed; see 2 Hawk. P. C. c. 27. s. 70.

(C) BY WHOM TO BE RETURNED.

1. ASHLEY'S CASE. T. T. 1696. K. B. 2 Salk. 479.

The return to a certiorari must be made by the party to whom it is directed. Two orders were removed by certiorari, but the return was quashed, because, in the schedule annexed to the writ, the return was not made by two justices, but by the clerk of the peace, who was not the person to whom the certiorari was directed; and thereupon a new certiorari was granted. See 2 Keb. 385; 2 Hawk. P. C. c. 27. s. 66; 1 Roll. Abr. 752; Lac. Ab. Certiorari; Williams, J. Certiorari. 8.

2. REX V. THE INHABITANTS OF BARKING, &c. E. T. 1705. K. B. 2 Salk. 452. A certiorari issued to remove all orders concerning the inhabitants of the

parish of Barking, Needham, Market, and Darmesden hamlets, and the it was directed to the order mentioned Barking, and Needham, and Darmesden hamlets without justice of Market. It was argued, that they must be taken to be the same; for in *Chester*, 1 Sid. 64. a writ was addressed to the justice of Chester, and returned by the Chief Justice, was holden sufficient. *Holi, C. J.* The Chief Justice of Chester in his patent, is called *juriciarius*, and there was but one till 18 Eliz. c. 8., which gave the queen power to make another who is styled *alter juriciarius*, and the first *justiciar*, and so our writs are directed; we, therefore, take notice of him, and do not regard his calling himself Chief Justice.

3. *REX v. GRIESLY* T. T. 1686. K. B. Comb. 25.

Per Cur. A certiorari, though directed to divers justices, may be returned by one.

(D) MODE OF MAKING THE RETURN.

The proper mode of making a return seems to be to indorse on the back of the writ, "the execution of this writ appears in a certain schedule hereunto annexed," and then to send the schedule on a distinct piece of parchment, annexed to the record of the indictment, and transmit them together to the superior jurisdiction; see 1. Saund. 134; Burn. J. certiorari, IV; Williams, J. certiorari, VIII; Hand. Prac. 39. 396. And the words, "humbly certify, &c," are unnecessary and improper; see Carth. 223. The schedule must be made on parchment, for it will be quashed if on paper; 1. Arnard. 113; Burn, J. certiorari, IV; Williams, J. certiorari, VIII. It is, in general, advisable, that where a certiorari is directed to justices of the peace for the removal of indictments taken before them, the return should have the clause "to hear and determine diverse felonies, &c." as well in the description of the magistrates, who make the certificate, as of those before whom the indictment is said to be taken in its caption; see Dalt. J. c. 195; 2 Hawk P. C. c 27. s. 68; Bac. Abr. certiorari, H; Burn. J. certiorari, IV; Williams, J. certiorari, VIII. And if the words, "the jurors of our said lord the king," on their oath present, be omitted, the return will be invalid; see Carth 223; Bac. Abr. certiorari, H. It is also said that the return must be under the seal of the inferior court, to whom it is directed; and if they have no proper seal, under any other seal they may think fit to employ; see Cro. Eliz 821; 1 Lev. 311; 1 Hawk. P. C. c. 27. s. 65; Bac. Abr. certiorari, H, Burn, J. certiorari, IV. But it seems that at the present day, the total absence of the seal would not be material; see Cald. 297; Williams, J. certiorari, VIII. It is, however, said, that where on a single justice returns it, a seal is requisite; Williams, J. certiorari, VIII. If the return be defective, it may, nevertheless, be amended by leave of the Court; see 4 East. 175; id. note b; 1 Saund 249. note 1; 4 East. 175.

If any improper delay arise, the return may be enforced by a side bar rule, whereby the parties to whom the writ was directed, are commanded to return it after six days' notice given them; but if this side bar rule be obtained without sufficient ground, the defendant may move to have that rule discharged; see 1 East. 299. After this side bar rule and notice, in general, the inferior jurisdiction are bound to make return, even though it should appear that the writ was improperly granted; see 1 East. 306; 5 T. R. 543. And a clerk of the peace cannot refuse to transmit the records in his custody, on account of fees duo to him, for he has no lien upon them to justify his detainer; see 1 Leach. 201. If the return be still withheld, an *alias*, then a *pluries* or a *causam nobis significes* issue, and then an attachment; see Fitz. N. B. 245; Com. Dig. certiorari, C; Burn. J. certiorari, IV; 2 Nolan. 352 Dick. Sess. 393. But the party to whom a certiorari is directed, may make what return to it he pleases, and the Court will not refuse to file it upon the affidavits of its falsity, unless in some particular cases, where the public good requires such interference, as in the case of the Commissioners of Sewers, or for some other special reason; but the only remedy is an action on the case at the suit of the party injured, or information for the impediment to public justice; see 6 Mod. 90; 1 Stra. 63; Hawk. b. 2. c. 27. s. 69; Bac. Abr. certiorari H; Williams, J. certiorari, VIII; and matter by way of explanation, or otherwise, unneces-

Or to divers justices, and returned by one, it was holden sufficient.

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sarily introduced on the return, will not be regarded by the court above; see 2 Salk. 492. 493; Hawk. b. 2. c. 27. s. 70. When the return is completed, it is sent by the clerk of the peace to the crown office, and delivered to the proper officer; 1 chit. crim. 394.

Affidavits impugning the return to a certiorari are not admissible, unless to prove that the return was corruptly made.

An action lies for making a false return to a certiorari.

And a magistrate by returning the conviction of a party to a writ of certiorari in a more formal shape than that in which it was first drawn up, and of which a copy had been delivered to the party convicted, was holden not to render himself subject to a criminal information, although it appeared that no certiorari would have been sued had the copy corresponded with the precise statement of facts disclosed by the return.

(E) MODE OF IMPUGNING THE RETURN.

COWPER'S CASE. H. T. 1703. K. B. 6 Mod. Rep. 90.

To a *certiorari* issued for the removal of all the inquisitions of forcible entries made by J. S., and the justices returned an inquisition of an entry made by B. upon F. S. Affidavits were produced to prove the inquisition of force by A., and the precept to inquire of a force against J. S. by A., and that they did not inquire of any other force.

Per. Cur. We will only receive affidavits, in order to have informations filed against the justices for this abuse, and not against the return, which is a matter of record.

(F) PUNISHMENT FOR MAKING A FALSE RETURN.

1. COWPER'S CASE. H. T. 1703. K. B. 6 Mod. 90.

The Court in this case observed, that if the return to a *certiorari* be false, you may have your action for a false return.*

2. REX V. BARKER. H. T. 1800. K. B. 1 East. 186.

A criminal information was applied for against a mayor under the following circumstances. A. B.'s goods had been taken in execution under a warrant of distress, issued under the hand and seal of the defendant; in consequence of which, A. B. applied to the defendant's clerk for copies of the warrant and proceedings on which the defendant had granted the same, which, when compared with the original signed by the defendant, then being upon the file of informations and proceedings taken and recorded before him, were furnished him. A. B. then obtained a writ of *certiorari*, when the defendant returned a record of conviction drawn out at more length, and in a more formal manner, than the one from which the above copy had been taken, which alteration was attempted to be justified on the part of the defendant, that the copy with which A. B. had been furnished, was merely intended as a copy of the minutes of the conviction, and that it was the constant practice of magistrates to proceed in this manner; first taking down minutes of the proceedings on which their judgment was founded, and afterwards having them drawn up in form before they were filed of record. And although it was urged in support of the application, that such practice led the parties to incur an unnecessary expense by bringing a writ of *certiorari*; the court acquiesced in the arguments advanced on behalf of the defendant, observing, that it was a matter of constant experience, that it was by no means unusual to draw up the conviction in point of form after the penalty has been buried under the judgment; and that the position as to the expence incurred was not tenable, as a *certiorari* was only meant to relieve parties oppressed by any substantial defect in the justice and legality of the proceeding itself before the magistrate; and not to be made use of in the case of a mere informality in the manner of drawing up the conviction.—Rule refused.

(G) PUNISHMENT FOR NOT RETURNING.

An attachment lies for not returning a certiorari; see Crom. 116.

XI. BAIL ON.

(A) IN WHAT CASES BAIL IS REQUIRED.

In criminal cases, when the return to the *certiorari* has been made, and the indictment removed to the Kings's Bench at the instance of the defendant, if the bail in the recognizance are exceptionable, the prosecutor's solicitor may compel the defendant to add sufficient bail, by taking out, and serving on the defendant's clerk, in court, a judge's summons for a *procedendo*, unless better bail be put in; see Halld. Prac. 39. If he do not find sufficient sureties,

* If the person to whom a *certiorari* is directed make a false return, the Court will not stay the filing of it on an affidavit of its being false, except in public cases, as in instances of commissioners of sewers, or for not repairing highways, or for some such special causes; see Dak. c. 193.

then, upon the attendance of the summons, the judge will order the *procedendo* to issue, and the indictment and proceedings will be sent back to the court in which the prosecution was commenced; *Hand. Prac.* 39.

In civil proceedings, anterior to the introduction of any legislative enactments on the subject, bail, on the removal of causes from an inferior jurisdiction by certiorari, or *habeas corpus*, was in all cases, required in the court above, with the exception of actions for words or trifling assaults, or in suits against an executor or administrator; see 1 *Salk.* 98; 2 *Ld. Raym.* 767. And now, by the stat. 19 Geo. 3. c. 70. (continued by 51 Geo. 3. c. 124. s. 3,) which prohibits an arrest for a cause of action under 10*l.*, it is provided, that no suit, where the cause of action shall not amount to the sum of 10*l.* or, upwards, (extended to 15*l.* or upwards by the stat. 51 Geo. 3. c. 124. s. 3., but which has since expired,) shall be removed, or removable, into any superior court by writ of *habeas corpus* or otherwise, unless the defendant shall enter into a recognizance in the inferior court to the plaintiff, with two sufficient sureties in double the sum due, for the payment of the debt and costs in case judgment shall pass against him. A similar recognizance is required by the stat. 34 Geo. 3. c. 78. on the removal of causes from any court of inferior jurisdiction into the court of Common Pleas at Lancaster, where the cause of action does not amount to the sum of 10*l.* and upwards. The practice adopted, in conformity with the apparent design of these enactments, appears to be, that where the cause of action does not amount to the sum of 10*l.*, the defendant will not be obliged to put in special bail upon a certiorari, or *habeas corpus*, in the court above; as in actions for that sum the defendant could not have been arrested; but if the subject matter of the suit be under 10*l.* &c., he must enter into a recognizance, with two sureties, to the plaintiff in the court below, pursuant to the regulations in the stat. 19 Geo. 3. c. 70. s. 6. [270]

(B) BAIL, WHEN AND IN WHAT MANNER PUT IN, EXCEPTED TO, AND JUSTIFIED.

1. CLARKE V. HARBIN. H. T. 1712. C. P. Barnes. 90.

In May, 1742, a writ, returnable immediately, was lodged at the Palace Court, to remove a plaintiff from thence into this court; nothing further done till November, when plaintiff served defendant with a rule to put in bail. Defendant insisted that plaintiff should have been served with such rule within two terms after the writ was obtained. But the Court held, that if defendant had put in bail without staying to be forwarded by a rule for bail, and plaintiff had not declared within two terms after bail put in, the cause would have been out of court; but this rule for bail is not limited to any particular time.

At the return of the certiorari, a rule must be obtained for bail, but no particular period is limited with in which the plaintiff must obtain such rule. [271]

* If the defendant be in actual custody on *mesne* process, the Court will not discharge him until bail above has been put in and perfected; it is therefore, in such case advisable, in order to accelerate the defendant's liberation from confinement to put in and perfect bail below before suing out the writ; *Highmore on Bail*, 115. But if he be not in actual custody when the certiorari or *habeas corpus* is returned, he must put in special bail if called upon so to do, and enter a common appearance in the superior court, according to the fact of the action being bailable or non bailable. The defendant ought not to be admitted to bail by the Court below, after the certiorari or *habeas corpus* has been delivered. And in the King's Bench it is a rule, that "no bail shall be put in upon any writ of *habeas corpus* before the writ is returned, and that such bail shall not be taken by any justice of that court, unless that writ, with the return thereof, shall be offered before said justices to be filed at the time of putting it in.

† Or order must be obtained from a judge for the defendant to put in bail within four days after notice of the rule if in term, or in vacation within six days after the notice was delivered; see R. H. 10 W. 8. K. B.; R. H. 13 & 14 Car. 2. C. P.

Bail may be put in pending the rule before a judge in town, a commissioner in the country, or a judge of assize on the circuit: see R. T. 8 W. 3. reg. K. B. After the removal of the person of the defendant from the King's Bench prison to the Fleet, bail may be put in and justified in either court; see 1 B. & P. 311. In the King's Bench they are taken on a bail-piece, which is annexed to the writ of *habeas corpus* and return, setting forth that the defendant is delivered to bail upon that writ, at the suit of the plaintiff or plaintiffs in the plaint; see R. T. 8 W. 3. K. B.; but in other respects the practice is the same, and regulated in the same manner as in ordinary cases. In the Common Pleas, the bail piece contains a concise statement or abstract of the *habeas corpus*, with the names and additions of the bail, and the sum sworn to, and is filled up by the clerk of the dockets, who attends one of the judges to put in bail, or if necessary, to accept the render of the principal; see

Persons who were bail in the inferior court may be bail in the superior, but a different rule obtains where the cause is removed from London.

2. ANON. M. T. 1698. K. B. 1 Salk. 97.

The court said : if a cause be removed out of the *Marshalsea*, or any other inferior court, and the bail there offer to be bail to the action, the plaintiff is obliged to take them, because he might, but did not, except to them below; *aliter*, where a cause is brought into the K. B. out of London, for the sufficiency of the bail is at the peril of the clerk, and he is responsible to the plaintiff; so that the plaintiff had not the liberty of excepting against them, and the clerk is not responsible for if they be deficient in that court, though he was in London. See Barnes. 63.

(C) OF THE LIABILITY OF THE BAIL, AND HOW DISCHARGED.

The recognizance of bail in the King's Bench, on the removal of a cause from an inferior court is general; that if the defendant be condemned at the suit of the plaintiff in the plaint, he shall satisfy the costs and condemnation, or render himself to the custody of the marshal. But, in the Common Pleas, it is taken in a penalty or sum certain, being double the amount of the sum sworn to, upon condition that the defendant do appear to a new original, to be filed within two terms; and that if he be condemned in the action, he shall pay condemnation money, or render himself a prisoner to the Fleet; and, in that court, on a removal by *habeas corpus*, the original should, it seems, be shown upon tendering the declaration, if insisted on, and agree in the nature of the action, the sum in demand, and the county; otherwise the bail are not liable. The responsibility of the bail, upon a *habeas corpus*, is commensurate with the [272] number of actions specified in the return of the writ, wherein the plaintiff, or plaintiffs, shall declare within two terms; see R. H. 2 Jac. K. B. But this rule is construed as applicable only to bail upon a *habeas corpus* before declaration; for it is said, that if the plaintiff have declared before the *habeas corpus* delivered in one action which requires the special bail, and another wherein common bail is sufficient, the bail shall be special only as to that which requires special bail, and common as to the other; see 2 Crompt. Pr. 428. On a removal of the cause after declaration, the bail are liable, though the plaintiff declare in a different form of action, in the court above, from that which he had adopted in the inferior jurisdiction, provided it be for the same cause: see 1 Wils. 277. Where a defendant, who has been sued in an inferior court, removes the action to a superior jurisdiction, and fulfills the preliminary condition of putting in and perfecting bail in the latter, the bail below are discharged; but if the plaintiff remove it, the bail are exonerated unconditionally and *instantly*; see 3 M. & S. 328.

Imp. C. P. 704. Immediately after bail have been put in, notice in writing should be served upon the plaintiff's attorney; and if it be not delivered before the expiration of the rule or judge's order, the act of putting it in will be negatory. After service of the notice of bail, the plaintiff is allowed 28 days in the King's Bench; see R. M. 16 Car. 2.; or in the Common Pleas; see 13 & 14 Car. 2. C. P.; 20 days to except them; and if he do not object to their insufficiency within that time, the bail-piece should be regularly filed by the defendant's attorney within four days afterwards, and they then become absolute and cannot be opposed. When the plaintiff is dissatisfied with the bail put in by defendant, and intends to except to them, he should obtain a rule or order from a judge for a better bail. On this rule or order being served, and there being four days of the term unexpired, the notice of justification, and of adding and justifying new bail, must be given as in ordinary cases, and they must justify within the four days; but if the rule or order be served in vacation, it is sufficient for the defendant to give notice within the time allowed by the rule of an intended justification on the first day of the ensuing term; see 2 Sel. Prac. 272; 1 Tidd. 411. The bail justify in the same manner, and similar objections may be urged against their competency, and the regularity of the proceedings, as when they appear to justify in original causes.

The indulgence of further time to enable the parties to amend inaccuracies in the notice of bail, jurisdiction, &c. is never granted where a case has been removed by *habeas corpus*; see 1 Chit. Rep. 76; and on account of the delay; *per* Bayley, J. C., 55 Geo. 3. K. B.; this rule is invariably enforced, except in cases of unavoidable accident, or where the bail are prevented from attending in consequence of unexpected indisposition; see 2 Chit. Rep. 107; and even where illness has been the cause of the non-attendance of the bail, time has been refused small bail; E. T. 1828. K. B. MS. But the importance of the cause, and the production of an affidavit of merits, induced the judge in a recent case to relax the rule, it appearing that the absence of the bail had arisen entirely from mistake; see *Harborow's* case, E. T. 1828. K. B. MS.

(D) CONSEQUENCES OF NOT PUTTING IN AND JUSTIFYING BAIL.

If bail be not put in and perfected in due time, a *procedendo*, on application to a judge at chambers, will be awarded; see R. M. 1654. K. B.; R. H. 13 & 14 Car. 2 C. P. This is a judicial writ, directed to the judges of the inferior court, commanding them to proceed in the cause, notwithstanding the writ before delivered to them, and from the moment it is served removes the suspension created by the *certiorari* or *habeas corpus*; see 6 Mod. 177; 1 Salk. 352; Holt. 322. If the bail be put in after the expiration of the rule for that purpose, and before the *procedendo* is sued out, it seems that a *procedendo* cannot be subsequently issued; hence the plaintiff in an inferior court, from which a cause is removed by *habeas corpus*, is not entitled to a *procedendo* after render of the defendant, and notice of such render, although it be made after the day on which the rule for better bail expires; see 16 East. 387; and where the rule expired in vacation, a render on the first day of ensuing term, *sedente curia*, was deemed valid, although notice of that fact had not been given till a later hour on the same day, and after a writ of *procedendo* had issued to the inferior court in which the cause had been originally commenced; see 5 East. 533; 2 Smith. 242; but where a rule for better bail had been served on the 14th, and the party did not justify until the 19th, the plaintiff was considered to be clearly entitled to a *procedendo*, see Chit. Rep. 130. After service of the rule for the allowance of bail a *procedendo* cannot regularly be issued, on the ground of a defect in the proceedings, without first moving to set aside the rule for the allowance; see 1 Chit. Rep. 575. A cause that has been sent back to the court below by a writ of *procedendo*, can never afterwards be removed before final judgment; see 6 T. R. 763; it has, therefore, been determined, that proceedings against bail by *scire facias* cannot be removed from an inferior court, by which the original cause had been remanded by *procedendo*; see 6 T. R. 465; 8 T. R. 152; 1 H. Bl. 631; 2 Campb. 396.

XII. AS TO QUASHING THE WRIT OF CERTIORARI.

1. *Rex v. Seton*. T. T. 1797. K. B. 7. T. R. 373. S. P. *Rex v. Dixon*. M. T. 1703. K. B. 6 Mod. 62; S. C. 2 Ld. Raym. 971; S. C. 1 Salk. 130.

On motion to quash a *certiorari*, to remove an indictment for not repairing a road, on the ground that it had been served after verdict and judgment pronounced in the inferior court. The court made the rule absolute, observing, that in the case of summary proceedings, orders, &c. before justices, they might be removed by *certiorari* after judgment, because such proceedings could only be removed by *certiorari*; but where a judgment has been given on an indictment, the record must be removed by writ of error.

2. *Jones v. Davies*. M. T. 1822. K. B. 1 B. & C. 143.

A rule nisi had been obtained to quash a *certiorari*, taken out in this cause, to issue a *procedendo*, and that plaintiff should pay to defendant costs incurred below, and the costs of the application. It appeared that the cause had been entered for trial at the Great Sessions for C., and that after every expense had been incurred, on the day before the trial a *certiorari* was delivered to the judge. The authorities of Zink and Langton (2 Doug. 749), and Williams and Thomas (id. 751. n.) were relied on. Cause was shown, and it was contended, that even if the court ordered a *procedendo* to issue, it had no jurisdiction over the costs incurred in the court below. *Per Cur.* It is clear, from the authorities, that a *certiorari* cannot be sued out but on very special grounds. To remove proceedings from the courts of the counties palatine and Great Sessions of Wales. The *certiorari* must therefore be quashed, and the *procedendo* issued. By the suing out of the *certiorari* the court has acquired a jurisdiction over the whole of the costs. We therefore order, that the master allow the costs below and the costs of this application. Rule absolute with costs.

3. *Anon.* E. T. 1702. K. B. 3 Salk. 80.

Certiorari to remove the indictment *de duobus equis felonice abductis*, and the

* But such irregularities, it is not for the party to whom it is directed to urge as an excuse for not obeying it, for it rests entirely with the Court to recall its own process; see 1 East. 306; 5, T. R. 649; 13 East. 416.

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If the writ be improperly granted, as if it be served after judgment in the inferior court, it will be quashed.* So where without notice and without any special reason a *certiorari* was delivered to the judges of the court of great sessions on the day before trial, the Court of K. B. quashed the *certiorari* and directed a *procedendo* to issue, and also awarded the costs of the *procedendo* to be paid by the plaintiff.

And the same rule applies if there be a variance between the writ and the indictment.*

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But *semb.*, that a *certiorari* which it was in the discretion of the court to have granted

indictment was *deum equo furtive abducto*. *Per Cur.* Nothing is here before the court, neither have they any warrant to proceed in this case, for there is a variance between the indictment and the writ.

4. *REX v. CASSON*. T. T. 1823. K. B. 3 D. & R. 36.

It was contended, upon a motion to quash a writ of *certiorari* obtained by the defendant, *quia improvide emanavit*, that the objection should have been made on showing cause against the rule nisi for the writ, and that consequently the prosecutors were concluded.

Per Cur. If this were a case in which we had clearly the power of issuing a *certiorari*, and the point for consideration was, whether the court, in the exercise of the discretion which is ordinarily vested in it in those cases, could have granted the writ, we should have thought that the arguments urged was conclusive, and that we ought not to have granted a rule for quashing the *certiorari*, because the prosecutors had an opportunity of showing cause against the rule originally obtained; but this is not one of those cases, cannot be quashed where no objection has been taken to it when originally moved for.

If a *certiorari* be in formal the Court will grant a second *certiorari*.

If it be to affirm but not to reverse a judgment.

XIII. AS TO GRANTING A SECOND CERTIORARI.

1. *BURNABY v. SAUNDERSON*. T. T. 1704. K. B. 1 Salk. 267.

Error was brought on a judgment, and want of an original assigned for error. The defendant in error came in gratis, and alleged diminution, and praying a *certiorari*, and thereupon a variant original was certified. Upon this, another application was made, and suggested another original of such a term, and prayed another *certiorari*, which the court granted.

2. *MERRYFIELD v. T. T.* 1728. K. B. 2 Stra. 765.

The plaintiff in error took out a *certiorari* of a wrong term, which did not verify his error, and then moved for a second *certiorari*, which was denied the court saying: it may be granted to affirm, but not to reverse a judgment.

It is questionable whether the writ itself is amendable.

XIV. AMENDMENT OF A CERTIORARI.

1. *MASTERS v. RUCK*. T. T. 1739. C. P. Banes. 12.

The *teste* of a *certiorari* by mistake was made in the 13th year of our Lord instead of our reign. On motion for leave to amend the same, the court doubted whether they had power to amend such writ or not. See H. 6. c. 8; 14 Edw. 3. c. 6. s. 3. Vent. 271; 1 Lev. 2.

2. *THE KING v. CHRIS. ATKINSON*. E. T. 1802. K. B. 4 East. 177. note.

But it may be rectified in the return, and as regards the caption in the indictment.

A rule to show cause had been obtained why the return to the writ of *certiorari*, issued at the instance of the defendant, should not be amended, by adding the commission ofoyer and terminer, and the names of justices of whom the court was composed when the indictment was found, according to the truth, fact, and minutes of said court; also why the caption of the said indictment should not be made conformable with the return, when mended, and also why the names of the jurors by whom such indictment was found, as stated in the return, should not be inserted.—The rule was afterwards made absolute.

XV. TRIAL AND SUBSEQUENT PROCEEDINGS IN THE SUPERIOR COURTS.†

1. *REX v. DAVIES*. E. T. 1794. K. B. 5 T. R. 628.

Per Buller, J. If an indictment preferred at the assizes be removed by cer-

* So when in consequence of an error in the return the record is not removed, the Court will either quash the writ and order a new one; see 2 Salk. 147; or they will allow the court below to proceed: see 2 Keb. 142; 2 Hawk. P. C. c. 27. s. 82; Williams, J. *Certiorari* X. And if the Court think they have issued the writ improperly, they may order it to be superseded, and the return taken off the file; see 1 Burr. 488; 2 Hale. P. C. 215; 2 Hawk. P. C. c. 27. s. 63.

† The Court above, however, cannot alter, or in any way amend the indictment certified to them, because they have not the concurrence of the jurors by whom it was presented; see 1 Chit. Crim. 297; 2 Stra. 1026; Com. Dig. Amendment 2. c. 1.

‡ As soon as the writ is returned to the crown office, the prosecutor's clerk in court makes out a *venire* for the defendant to appear, upon which the solicitor gets him summoned by the sheriff, and upon the return of it, the defendant usually appears, when he is entitled

torari, the place of trial is the same, with this difference only, that it will now be tried on the civil, instead of the criminal side of the court.

XVI. COSTS ON A WRIT OF CERTIORARI.

1. REX V. JENKINSON. M. T. 1785. K. B. 1 T. R. 85.

A conviction under the lottery act being removed by certiorari, and affirmed. and the master having refused to tax the costs of the certiorari, an application was made to the court for that purpose. But the court were of opinion that the master had acted correctly, and observed, that the king was never entitled to receive costs, nor bound to pay them. And that they were not authorized to grant costs under the 13 Geo. 2., unless a recognizance be entered into. And declared that for the future they never would grant a certiorari, unless the party applying entered into such a recognizance.

2. REX V. DORE. 1738. K. B. Andr. 352.

A conviction against the defendant for deer-stealing having been removed by certiorari, and affirmed in this court, it was moved that costs might be referred to the crown-office for taking in an adversary way, the defendant having given a bond for costs, pursuant to the 3 W. & M. c. 18. s. 6. On the other side it was argued, that an affidavit having been made by the prosecutor, that every penny set down in the bill of costs had been paid by him, he ought to be reimbursed the same, it being the design of the act that the prosecutor should have nothing to pay, even his own attorney. But the court said: although the words of the act are *full costs and damages*; yet the prosecutor ought not to have such allowed as are unusual or unreasonable; that the bill ought to be taxed as between attorney and client, A rule was, therefore, granted for referring the bill to the master.

3. REX V. MIDLAM. T. T. 1765. K. B. 3 Burr. 1720.

On behalf of the prosecutors, cause was shown against a rule which had been made to show cause "why the master of the crown-office should not be directed by the court to forbear, and not to proceed to tax the prosecutor his costs in these causes, relative to the affirmance of the convictions against the defendant in these causes;" and also "why the bond entered into by, or on the to an imparlance to the following term; but if he does not appear, the prosecutor's clerk in court, upon the production of the sheriff's return to the *venire*, makes out a *distringas*, upon which 40s. issues are levied on the defendant's effects; and if there be no appearance on the return of that, on an affidavit of the writs having issued and being returned as above, the Court award an *alias*, and after that a *pluries*, &c. enlarging the issues on every writ until the defendant appears, when they will compel him to pay the costs of the writs of *distringas* out of the issues levied. But if the sheriff returns the *venire*, *non est inventus*, then upon the production of such return the clerk in court makes out a *capias* for the sheriff to take the defendant into custody, which he will do; whereupon the defendant to procure his enlargement must enter an appearance, upon which he will be discharged by *supersedeas*. If the defendant be taken on a warrant, which a judge may grant on the return of the *venire*, the defendant must then put in bail before he is discharged; see Hand. Prac. 42.

* Is either at bar or at Nisi Prius by a jury of the county, out of which the indictment is brought; see 4 Blac. Com. 320. If it be stated that a fair and impartial trial cannot be had in that county, the Court will order it to be tried in the next adjoining one; see 3 Burr, 1330; 6 T. R. 195. And a special jury may be obtained; see 5 T. R. 626.

The prosecutor's solicitor may compel the defendant to proceed to trial according to the terms of his recognizance, unless he appears and pleads within the term, and proceeds to trial at the sitting of Nisi Prius after the term, if in the town, and in the country at the next assizes; see Hand. Prac. 40; where the prosecutor does not by obtaining and serving the usual rules compel the defendant to proceed to trial, the recognizance will not be considered as forfeited; see 2 Hawk. P. C. c. 27. s. 54.

† That act, with many others, relating to this subject is repealed by the 16 Geo. 3. c. 30. but the words of it, as far as respect the quantity of the prosecutor's costs, and the mode in which they are to be ascertained, are adopted in the latter statute, which enacts, "that no certiorari shall be allowed to remove any conviction or other proceedings on this act, unless the party convicted shall, before the allowance of such certiorari, become bound to the prosecutor in the sum of 100*l.* with sufficient sureties as the justices before whom the offender was convicted (shall approve of), with condition to pay the said prosecutors within 30 days after such conviction confirmed, and procedendo granted his full costs and damages to be ascertained on oath."

The trial* of an indictment removed by a certiorari is on the civil side of the court. [276] A defendant is not liable for the costs of a certiorari, unless under the 13 Geo. 2. he has entered into a recognizance to pay them. On the affirmance of a conviction for deer-stealing, removed by certiorari, the prosecutor is entitled to taxed costs under the 3 W. & M. c. 10† [277] But the prosecutor is not entitled to costs un

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behalf of the defendant. on allowing the *certiorari*, should not be delivered up to the said defendant, or his clerk in court to be cancelled." This *certiorari* was brought for removing a conviction upon the game laws; and the present rule was grounded on an affidavit of hardship and oppression upon the defendant; namely, that although the defendant had paid the forfeiture on the conviction, yet an action had been brought against him for the same offence; and when he wanted to plead this conviction in bar of the action, the justice had refused to give him a copy of it, and he was obliged to remove it by *certiorari*; and the prosecutor set it down in the paper, and got it affirmed, and then the prosecutor became nonsuited in the action. On behalf of the prosecutor, it was insisted that the act of 5 Ann. c. 14. s. 2. directs full costs to be paid upon removing these convictions, in case the conviction be affirmed. And this is general; and they must be paid in all cases where the conviction is affirmed, be the *certiorari* brought "upon any pretence whatsoever," (for so the act of parliament is expressly worded.) And this conviction being affirmed, that therefore the court could not, upon this man's own affidavit, enter into the cause or occasion of the removal of the conviction by this *certiorari*.

Per Cur. This is not a case within the intention of the statute of the 5 Ann. c. 14. s. 2. for this *certiorari* was not brought for vexation, or out of obstinacy or perverseness, nor to over-hale or object to the conviction, but an action being brought for the same offence, the defendant in that action could not obtain (though he ought to have had it) a copy of the conviction from the justice of the peace who made the conviction; and therefore he was obliged to bring a *certiorari* to remove it, and he removed it for that purpose only. The prosecutor had no occasion, therefore, to be at any expence about it, for the defendant did not object to it. But the prosecutor set it down in the paper, only to increase expence, and merely for vexation, supposing "that the defendant would have been obliged to pay for it." The plaintiff in the action was nonsuited; and I think the defendant, instead of paying costs, ought to have an allowance of the costs he was put to in removing the conviction, as it was a necessary part of his defence. Therefore the present rule ought undoubtedly to be made absolute. *Wilmot, J.* was extremely clear, that this was not a case within the intention of the second section of the 5 Ann. c. 14., and he thought (as *Lord Mansfield* also did) that the justice ought to have given the defendant a copy of the conviction, without putting him to the trouble and expence of bringing a *certiorari* to remove it. The bringing the action for the same offence was a gross oppression. *Mr. Justice Yates* also concurred. The justice ought to have given the defendant a copy of the conviction, for it was a record, and the defendant was entitled to it. And he ought to have been allowed the expence of his necessary bringing this *certiorari*, in costs upon the nonsuit, for it was necessary to his defence in the action. He did not remove the conviction, in order to object to it; on the contrary, he had submitted to it, and had paid the penalty. He removed it out of necessity; it was necessary to his defence in the action. He thought this proceeding of the prosecutor to have been a very oppressive one in every stage of it; and that the bringing the *certiorari* under the circumstances of the present case, did not entitle the prosecutor to his costs upon affirmation of the conviction.—Rule absolute, and the prosecutor to pay the costs out of the pocket of this application.

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4. *REX v. ASHTON UNDERHILL.* E. T. 1783. K. B. Cald. 416.

And where an order of removal on C. was quashed, and the clerk entered it as confirmed. and

An order of removal from the hamlet of C. to the parish of A. was quashed upon appeal to the sessions, subject to the opinion of the court of King's Bench upon a special case; but the clerk of the peace having, in his minute

* Chap. 14. s. 2. which enacts, that no *certiorari* shall be allowed to remove any conviction or other proceedings on this act, into any of the courts at Westminster, upon any pretence whatsoever, unless the party convicted shall, before the allowance of such *certiorari*, become bound to the prosecutor in 50*l.* with such sufficient securities as the justice before whom the offender shall be convicted shall think fit, with condition to pay to the prosecutor within 14 days after the conviction (confirmed) or procedendo granted, his full costs and charges to be ascertained upon his oath; and in default thereof the justice shall proceed in execution of the conviction in such manner as if no *certiorari* had been awarded.

book or book of orders, entered that the appeal had been confirmed, it became a *certiorari* necessary, to prevent the parish of A. from being concluded by this false entry of the officer, for that parish to remove the orders; the recognizance was accordingly entered into by them, and the *certiorari*, moved for in the name of the K. v. the Inhabitants of A. The clerk of the peace made his return according to the truth of the fact, stating that the order of two justices had been quashed by the sessions; and afterwards, for the purpose of preventing the expence of recognizance, and the burthen of costs, in the event of their not succeeding, from falling upon them, which, by the 5 Geo. 2. c. 19. s. 2. the parish of A. would otherwise have been subjected to, a rule was obtained to show cause why the *certiorari*, lately returned with the orders, should not be considered to have issued at the expence of the hamlet of C. and also why they should not enter into a recognizance to pay the inhabitants of the parish of A. their full costs and charges, to be taxed according to the course of the court, if the order made by the quarter sessions, against the said hamlet of C. should be confirmed. This rule was made absolute without opposition.

5. *REX V. THE INHABITANTS OF MADLEY*. M. T. 1743. K. B. 2 Stra. 1198. A man, his wife, and daughter, were removed by order of two justices of the peace, which, upon appeal, was confirmed; and being removed by *certiorari* into the King's Bench, was there quashed as to the daughter, her age not being stated, nor the place adjudged to be the place of her settlement; but as to the man and his wife, the orders were confirmed. It then became a question, upon the statute 5 Geo. 2. c. 19. s. 2. whether costs should be paid? and a case was cited of the inhabitants of Great Chart, Mich. 16 Geo. 2. where the court affirmed the order of sessions as to the point of the appeal, but quashed a reservation in the same order as to the costs in case of a new removal; and it was determined, that the prosecutor of *certiorari* should pay costs. *Sed per Cur.* That is a very different case from this; for there the party could not be affected by the part of the order which was quashed, till the sessions had made an actual order about the costs, and the bringing it up for the purpose of quashing that part was unnecessary, and consequently vexatious, which is the true test to go by. Whereas, here the parish, who brought the *certiorari*, were unjustly burthened with the daughter, and had no other remedy but to come here; and the parliament never intended to punish them for taking a legal remedy against a *gravamen*. In this case, therefore, the recognizance given on bringing the *certiorari* must be discharged.

6. *REX V. GILBIE*. M. T. 1806. K. B. 5 M. & S. 520.

The costs of conveying a defendant to gaol, in execution of his sentence, upon an indictment which had been removed here by *certiorari*, was allowed in the master's taxation to the prosecutor, under the 5 & 6 W. & M. c. 11. s. 3. A rule nisi having been obtained for the master to revise his taxation, the court discharged it, observing: under the terms of the recognizance, the defendant was bound to pay all reasonable costs. These costs, if not immediately occasioned by the *certiorari*, were certainly incurred in consequence of it. It is reasonable, therefore, that the defendant should bear the expense for which no other fund is provided.

7. *REX V. OSBORNE*. T. T. 1767. K. B. 4 Burr. 2125.

This indictment had been removed into this court by a *certiorari*, and the usual recognizance was thereupon entered into. The defendant was convicted and fined 50*l.* and the prosecutor had obtained a third part of it by an order of two judges, pursuant to the privy seal. On a motion for direction to the master to tax the prosecutor's costs under the recognizance entered into upon the *certiorari*, the court, after cause shown, were of opinion, that the prosecutor could not have both these advantages; viz. the costs under the recogni-

* But if the *certiorari* be superseded, *quia improvide emanavit*, the party suing it out is not liable to costs, for he ought not to be made responsible for an expence occasioned by an improvident act of the Court; see 2 Say. Costs. 306; Burr. 485. So where a sessions case is sent down to be restated, and upon its being returned amended, the parish removing it abandon the prosecution, they are not liable to costs under the 5 Geo. 2; see Burr. 504.

& 6 W. & M. c. 11. s. 3. They therefore made a rule to tax the recognizance, according to the direction of the act of parliament; and that so much as the prosecutor had received for the one-third of the fine should be deducted out of the sum allowed.

Although the principal may [281] have appeared in compliance with the recognizance the sureties will be liable to costs if they are not paid within 10 days after demand.

8. The 5 & 6 W. & M. c. 11. (made perpetual by the 8 & 9 W. 3. c. 39) after reciting that all the parties indicted prosecuting a *certiorari* for the removal of any indictment, or presentment of trespass, or misdemeanor, before a trial had from a court of general or quarter sessions of the peace, shall, before the allowance thereof, find two sufficient manucaptors, &c. enacts, that if the defendant prosecuting such a writ of *certiorari* be convicted of the offence for which he was indicted, the court of K. B. shall give reasonable costs to the prosecutor, if he be the party grieved or injured, or be a justice of the peace, mayor, bailiff, constable, headborough, tithing man, churchwarden, or overseer of the poor, or any other civil officer, who shall prosecute upon the account of any fact committed or done that concerned him or them as officer or officers, to prosecute or present, which costs shall be taxed according to the course of the said court, and that the prosecutor, for the recovery of such costs, shall, within ten days after demand made of the defendant, and refusal of payment on oath, have an attachment granted against the defendant by the said court for such his contempt, and the said recognizance shall not be discharged till the costs so taxed shall be paid. And the 5 Geo. 2. c. 19. (entitled, an act to oblige justices of the peace, at their general or quarter sessions, to determine appeals made to them according to the merits of the case, notwithstanding defects of form in the original proceedings, and to oblige persons suing forth writs of *certiorari* to remove orders, made on such appeals, into the court of K. B., to give security to prosecute the same with effect,) enacts, that the recognizance shall be certified into the court of King's Bench, and there filed with the *certiorari*, and order or judgment thereby removed; and if the said order or judgment shall be confirmed by the said court, the persons entitled to such costs, for the recovery thereof, within 10 days after demand made of the person or persons who ought to pay the same, upon oath made of the making such demand and refusal of payment thereof, shall have an attachment granted against him or them, by the said court for such contempt; and the said recognizance shall not be discharged until the costs shall be paid, and the order so confirmed shall be complied with and obeyed.

The words of the statute 5 W. & M. c. 11. s. 3. as to the 10 days, mean that the 10 days must elapse before the attachment can be granted.

9. THE KING v. IRELAND. M. T. 1790. K. B. 3 T. R. 512.

After the conviction of A. for a misdemeanor, B. entered into a recognizance for the costs under the 5 W. & M. c. 11. s. 3. which on motion for non-payment thereof, involved the question, whether, by the 3d section of 5 W. & M. which directs, that after a demand and refusal to pay the costs, the prosecutor shall, within 10 days, have an attachment against the defendant. Eight days are sufficient to entitle the prosecutor to an attachment. But,

Per Cur We are clearly of opinion that the 10 days must expire before an attachment can be procured; and if we were willing to hold the eight days sufficient, the consequence would be, that immediately after a demand and refusal, an application would be made to this court for an attachment. Rule refused.

[282] In the construction of the preceding statute it has been held, that the term con-

10. REX v. TURNER. E. T. 1812. K. B. 15 East, 570.

A rule was obtained to show cause why the taxation of costs, which had been had in this case should not be set aside. This was an indictment for a misdemeanor. The indictment was removed into this court by *certiorari*; and on the trial, the defendants were found guilty on one count of the indictment, and acquitted on the other counts. A motion was afterwards made in arrest of judgment, on behalf of the defendants; and this court, on argument, arrest-

* For the Court of K. B. having the king's privy seal for that purpose, may give the third part of the fine imposed on a defendant after a conviction on an indictment in that court, to the prosecutor, by way of reimbursing him the costs of the prosecution. see 1 Keb. 478; 2 Hawk. P. C. 6th edition, 801; 3 T. R. 512; 1 Salk. 55; 4 id.; 2 Lord Raym. 854; 21 Str. 1165; but in general, the payment of the fine does not discharge the recognizance for the costs; see Bac. Ab. *Certiorari*, D; Hawk. P. C. b. 2 c. 27, c, 58.

ed the judgment on that count on which the defendants had been found guilty. *victed** The prosecutor taxed his costs under the statute 5 W. & M. c. 11. s. 3. and means con- the defendants obtained the above rule, on the ground that the judgment hav- victed by- ing been arrested, there had not been any conviction of the defendants within judgment, and that the true intent and meaning of the act of parliament. The court said: the stat- consequent ute 5 W. & M. c. 11. directs by section 2 that no *certiorari* shall be granted ly though af- on the part of a defendant to remove an indictment for a misdemeanor from the ter there sessions, before he shall enter into a recognizance, &c. in 20*l.* to try at the removal the next assizes, &c. and by section 3, that "if the defendant prosecuting such defendant be found *certiorari* be convicted, the court of K. B. shall give reasonable costs to the guilty by a prosecutor; and that the recognizance shall not be discharged till the costs a jury, yet taxed shall be paid." But in the case before the court, judgment being ar- if the judg- rested, it appears that the defendants have not been guilty of any offence a- ment be af- gainst the law; that they have not been convicted or found guilty by the jury terwards ar- of any offence which the law recognizes as such. They can not, therefore, be rested, no considered as guilty persons, much less ought they to be mulcted with costs taxed for the prosecution. The rule must be, therefore, made absolute.—See 1 Burr. 1461; 8 T. R. 409; tor. 1 Hale. P. C. 686. Though, if a defend- ant and two sureties on

11. *REX V. SIDNEY*. E. T. 1741. K. B. 2 Stra. 1165.

Upon removing an indictment from the sessions of oyer and terminer, the defendant and his bail entered into a 500*l.* recognizance to plead, go to trial, and appear on the return of the verdict. He did so, and received judgment. And upon motion to discharge the recognizance, it was insisted that he should pay costs; but this not being in 20*l.* the sum required by the stat. 5 & 6 W. & M. c. 11. the court held it was to be considered as a recognizance at common law. And precedents being searched, it was found that costs had not been required. Here, therefore, being a performance of every thing the words extended to, the court discharged the recognizance. ter into a recognizance in a sum excee- ding 20*l.*, it is a re- cognizance at common law, and not within the 5 & 6 W. & M., and dischar- geable up- on its terms being com- plied with. [283] As where the defend- ant and o- ther enter ed into a re- cognizance on remov- ing an in- dictment from Hicks's Hall, the Court, after the defend- ant had been freed in K. B. discharged his recogni- zance. But where the recogni- zance was actually for- feited through the defendant's

12. *REX V. FONSECA*. T. M. 1756. K. B. 1 Burr. 10.

Cause was shown against discharging the defendant's recognizance. It was a recognizance entered into by the defendant and two other persons, upon his removing his indictment, (which was for an assault, with intent to ravish,) from Hicks's Hall, where it was originally found. The defendant had been tried, convicted, and fined in this court; and had paid his fine. After which, application was made to discharge the defendant's recognizance; it being a recognizance at common law, and the terms of it having been complied with, it was insisted, 1st, That it is not within the statute of 5 & 6 W. & M. c. 11. s. 2. being from the court of oyer and terminer, not from the sessions; and this statute relates only to indictment found at the sessions. 2d. That the principal is here bound, as well as the securities, therefore also it is not within the said act, which requires only two manucaptors, without the principal. 3d. The sum is also different, for it is not a recognizance in 20*l.* but 100*l.* himself, and each security 50*l.* Therefore, for this reason, too, it is not within the act; *Rex v. Sidney*, (*supra*) was cited, and relied upon by the counsel, as in point. And from Hicks's Hall, the Court, after the defend- ant had been freed in K. B. discharged his recogni- zance. But where the recogni- zance was actually for- feited through the defendant's

13. *THE KING V. LYON*. H. T. 1763. K. B. 3 Burr. 1461.

Cause was shown for the crown why the recognizance of bail should not be discharged. Defendant being indicted for perjury, removed the indictment by *certiorari* into the K. B.; previous to its issuing, he entered into a recognizance with two securities in the usual form, to appear and plead in the next term, and to give notice of trial, and to go bail in or at the sittings, after such next term, unless the court shall direct otherwise. This not being complied with, the recognizance became forfeited. The council for the crown then moved for costs for not going to trial, these costs had been taxed and demanded by the defendant, and for the non-payment of which the crown obtained

* See 1 Hale. P. C. 686. where Lord Hale, in commenting on 5 Eliz. c. 14., has these words, "by conviction, I conceive, is intended, not barely a conviction by verdict, where no judgment is given, but it must be a conviction by judgment."

neglecting ed, and executed an attachment, and the defendant was in custody upon it for to go to tri his contempt in not paying them. The defendant had, after the time limited al, the in the recognizance, given notice of trial in the following term, and was ac Court refus quitted. It was contended for the bail, that the prosecutor could have but one ed to dis charge it satisfaction for these costs, though he might either have required them of the bail without pay the principal in execution, but having made his election to proceed phying the against the person of the principal, and have his body in execution, he was not costs taxed afterwards still at liberty to proceed against the bail, *Per Cur.* As the re- for the pro- cognizance is actually forfeited, and the prosecutor has had costs taxed to him secutor, for the defendant's neglecting to go to trial, and has received nothing for these costs, (as the body is not a real satisfaction) there is no good reason for our dis- charging the recognizance.—Rule discharged.

And the not indors ing the pro secutor's name on the indict [284] ment does not affect his title to costs, provi ded it be proved that he is a per son compre hended within the 5 & 6 W. & M. as a civil offi cer.

Or a party grieved; within which lat ter term the prosecu tor of an indict ment for stopping up a publicfoot way, which stopped, was entitled, under the 5 & 6 W. & M. c. 11. s. 3. to costs, as be he has been accustomed to use, has been hold en to come.

And the same rule applies to persons who prosecuted a defendant for keeping a steam-en gine emit ting noxi ous vapours near their houses.

[285] But a per son who preferred an indictment merely for

14. REX V. SMITH. M. T. 1756. K. B. 1 Burr 54.

An indictment for a nuisance had been removed by *certiorari* from the quar- ter sessions into this court, by the defendant, which was afterwards tried, and the defendant found guilty. He then moved in arrest of judgment, but the application being refused, the prosecutor moved for his costs, and obtained a rule to show cause. On behalf of the defendant, cause was shown why the pro- secutor should not have his costs, before the recognizance should be dis- charged; and why it should not be referred to be taxed, on the ground that no name of any person, as being either the party grieved or injured, or a pub- lic civil officer, was endorsed upon the indictment, according to the directions of 5 & 6 W. & M. c. 11. s. 2 and 3. And further, that without such indorsement, no costs were payable to the prosecutor. It was urged, *contra*, that though there was no name indorsed; yet at the same time that an indorsement of the name of the prosecutor, as being the party grieved or injured, or a civil officer, was not at all necessary, in order to the court's giving him costs, yet an affidavit was produced, stating, "that the prosecutor was a civil officer, &c." And the words of the 3d section of the act, are, "that if he be so, the recognizance shall not be discharged, till the costs shall be paid;" not saying "that the prosecutor shall not have his costs, unless his name be endorsed."

Per Cur. It is enough if it be proved "that the prosecutor was a civil of- ficer, &c." And here it is established by affidavit, which is sufficient. Rule made absolute for the prosecutor having his costs.

15. REX V. WILLIAMSON. M. T. 1796. K. B. 7 T. B. 32.

An indictment for stopping up a footway, being removed by *certiorari*, and the verdict being found for the king, the question was, whether the prosecu- tor, a private individual, who had used this way for some years before it was way, which stopped, was entitled, under the 5 & 6 W. & M. c. 11. s. 3. to costs, as be he has been accustomed to use, has been hold en to come. being a party grieved or injured. *Pur Cur.* We are of opinion that the prose- cutor is a party injured within the meaning of that statute, and therefore enti- tled to costs.

16. REX V. DEWSNAP. T. T. 1812. K. B. 16. East. 194.

This was a *certiorari* to remove an indictment for a nuisance in using a steam engine, which emitted volumes of smoke, affecting the breath and eyes of cer- tain persons, their clothes, their furniture, and dwelling houses. After a ver- dict for the king, an application was made for the master to tax costs, as being parties grieved, within the meaning of the 5 W. & M. c. 11. s. 3. And of that opinion were the court, who observed, that this must necessarily be a special grievance to those who live within the direct influence of the nuisance, and are therefore parties grieved within the statute.

17. REX V. INGLETON. T. T. 1746. K. B. 1 Wils. 139; S. C. Bul. N. P. 333.

The defendant was indicted for an attempt to commit felony, by endeavour- ing to set on fire the house of one E., and the indictment also charged that the defendant solicited Mason, one of the prosecutors, to help to set fire to the house; Mason and one Glenton informed the mayor of, &c. who bound Ma- son and Glenton over to prosecute the defendant. The defendant removed the indictment by *certiorari* into court, and entered into a recognizance in the pen- alty of 20l. to appear and plead to the indictment, and to prosecute it to trial at

her own expence, which was accordingly done, and was convicted and fined; an attempt to commit a crime,* is not a party injured - and now it was moved that the recognizance might be discharged, she having paid the fine; this was opposed on the ground, that the stat. 5 & 6 W. & M. c. 11. the defendant was obliged to pay the prosecutor's costs; but

Per Cur. This case is not within that act of parliament, for that extends only to officers and persons really injured, which neither Glenton nor Mason, the prosecutors, are in this case; for there was no damage done to the house, the meaning of the act, it was only intended to be done; nor is either of them officers, and therefore the rule must be made absolute for discharging the recognizance.

18. *REX V. KETTLEWORTH.* M. T. 1792. K. B. 5 T. R. 33; S. C. Nol. Rep. 153.

This was an indictment for not repairing a road; and being removed into this court by *certiorari*, the defendant was found guilty. A. B. being a justice of the peace for the county, had as prosecutor, obtained a rule for costs, under 5 & 6 W. & M. c. 11. s. 3. The defendant then applied for a rule to show cause why this rule for costs should not be discharged, on the ground that A. B. was not the prosecutor, but one C., whose name alone stood upon the back of the indictment, who had always appeared as the prosecutor, and upon whom the notice of trial had been served. Cause was shown against this rule upon the affidavit of C., and the attorney for the prosecution. They stated that C. was the clerk of A. B. who being indisposed when the indictment was to be preferred, had directed C. to do it. That he had acted in the business entirely for A. B. who had employed the attorney to conduct the prosecution, and defrayed the expences of it. These depositions, it was insisted, were sufficient to prove that A. B. was in fact the prosecutor, and if so, as being a justice of the peace, he was a civil officer prosecuting in compliance with his duty, and therefore within the meaning of the act. *Per Cur.* Upon the facts disclosed, we are perfectly satisfied that A. B. is to be considered as the prosecutor of the indictment, and that he is entitled to his costs. This is a remedial law, and it ought to be extended so far as it plainly appears the legislature meant it should go. The statute says, "that the court shall give costs to the prosecutor, if he be the party grieved, or a justice of the peace, &c. who shall prosecute on account of any fact committed or done, that concerned him as an officer to prosecute or present. It is hard to say to what cases this clause extends, if it does not to the present one. It is true, that the magistrate was not bound to prosecute, and any other individual might have done it equally well. But still such a prosecution fell within his general duty as a magistrate.—Rule discharged.

Though it has been since hold en, that a justice of the peace who indicts for the non repair of a road, is en titled to costs under this statute.

19. *REGINA V. SUMMERS.* E. T. 1701. K. B. 1 Salk. 55.

Indictment for a trespass and riot. Defendant pleaded *non cul*, and the indictment was removed hither by *certiorari*, &c. The defendant went before the master, and costs were taxed. And now counsel moved he might go before the master again, that the prosecutor might be considered for his charges below, the master's taxation before being only for costs since the *certiorari*. And *Per Cur.* The master ought not to consider the costs below, but only since the *certiorari*. The counsel then moved to aggravate the fine. And *Per Cur.* You ought not to aggravate the fine after the party has been before the master; if you do, we will set aside the taxation of costs.

[286] It has been held, that the master of the Crown Of fice ought only, in his taxation, to include the costs subsequent to the issuing out the writ †

20. *REX V. TEAL AND OTHERS.* M. T. 1810. K. B. 13 East. 4.

The question which now arose was, with reference to the 5 W. & M. c. 11. The provisions 2 and 3. which requires a defendant removing an indictment for the sessions by *certiorari*, to find two sufficient *manucaptors*, who shall enter into a recognizance in 20l., conditioned to appear, plead, and try, &c., and that if the de-

* And a justice of the peace, who prosecuted a gaoler to conviction, for suffering a charged felon to escape, were holden no: to be individually injured within the meaning of the act; see 2 T. R. 47; 1 Burr. 54.

† If the defendant forfeit his recognizance by not proceeding to trial at the same time specified, it will not be discharged on application of the bail, until the costs of not proceeding to trial have been paid, notwithstanding the defendant be afterwards acquitted, and taken in execution for the amount of the taxation; see 2 Burr. 1461; 15 East. 672; Bac. Ab. *Certiorari*, D.

The provisions 5 W. & M. c. 11. that the recognizance shall not be discharged till the costs so taxed shall be paid, is not satisfied by payment

of the sum for which the recognizance was taken, the taxation exceeding that sum. defendant be convicted, and the court shall give reasonable costs to be taxed, &c.; and that the said recognizance shall not be discharged till the costs so taxed shall be paid; whether the amount of the costs to be taxed was limited by such recognizance. Lord Ellenborough, C. J. said: the court can in no case discharge the recognizance till the taxed costs are paid to the prosecutor. By the act the recognizance was merely ment to operate as a further security for the costs. See Ca. Temp. Hard. 247; 2 Stra. 1042; 2 T. R. 145.

21. REX V. CHAMBERLAYNE. H. T. 1786. K. B. 1 T. R. 103.

Costs taxed are a debt vested in the party to whom they are adjudged; there fore where, on the removal of an indictment by certiorari, after costs taxed, the party died, they where hold on to pass to his representatives. The defendant having been indicted for an assault, the indictment was removed by certiorari; and on the trial the defendant was found guilty, and paid the fine. The prosecutor afterwards died, and no person having administered to his effects, nor any demand having been made by the prosecutor in his life time for the costs, though they had been taxed, a rule was obtained to show cause why the recognizance should not be discharged, upon the supposition that they could not then be demanded, the words of the 5 W. & M. c. 11. s. 3. being that "the prosecutor for the recovery of such costs, shall within ten days after demand made of the defendant, and refusal of payment on oath, have an attachment granted against the defendant." It was argued, that on this statute the prosecutor may move for an attachment on non-payment of costs after a demand by him made, but that could not be done in this case for want of a personal demand. But the court considered the costs as a debt actually vested; and discharged the rule. See 15 East. 573; 2 H. Bl. 252.

22. REX. V. FINMORE. M. T. 1799. K. B. 8 T. R. 409.

An indictment at the sessions for a nuisance was removed into this court by certiorari, and the parties entered into the usual recognizance required by the statutes. 5 & 6 W. & M. The defendant was found guilty at the last lent assizes, and afterwards died on the 6th of April last before the day in bank. The costs of a defendant the prosecution were afterwards taxed, and they not having been paid by the administrator of the defendant, a rule was obtained calling on the defendant's bail to show cause why their recognizance should not be estreated, on the usual affidavit that J. C., the prosecutor, was the party agrieved; see 2 T. R. 47; 5 T. R. 33. After cause shown against the rule, the court said: this case came expressly within the words of 5 W. & M. which are, that the said recognizance shall not be discharged till the costs so taxed are paid."—Rule absolute.

Cessavit.

The writ of *cessavit* was given by the statutes of Gloucester, 6 Edw. 1. c. 4. and of Westm. 2 13 Edw. 1. c. 21 & 41. and is applicable when a man, who holds lands of a lord by rent and other services for two years together, or where a religious house hath lands given it, on condition of performing some spiritual services, as reading prayers or giving alms, and neglects it; in either of which cases, if the cesser or neglect have continued for two years, the lord or donor and his heirs shall have a writ of *cessavit* to recover the land it- self, *eo quod tenens in faciendis certis per biennium jam cessavit*; see F. N. B. 208. But by the statute of Gloucester, the *cessavit* does not lie for lands let upon fee-farm rents, unless they have lain fresh upon the premises, or unless the tenant hath so enclosed the land that the lord cannot come upon it to dis- train. See F. N. B. 209. For the law prefers the simple and ordinary remedies by distress, or by action, to this extraordinary one of forfeiture for a *cessavit*; and therefore the statute of Gloucester has provided farther, that upon tender of arrears and damages before judgment, and giving security for the future performance of the services, the process shall be at an end, and the tenant shall retain his land, to which the statute of Westm. 2. conforms, so far as may stand with convenience and reason of law. It is easy to observe, that the statute 4 Geo. 2. c. 28. (which permits landlords who have a right of re-entry for non-payment of rent, to serve an ejectment on their tenants when half a year's rent is due, and there is no sufficient distress on the premises), is in some measure copied from the ancient writ of *cessavit*, especially as it may be satisfied and put an end to in a similar manner, by tender of the rent and cost within six months after.

Cesset Executio. See tits. *Execution*; *Trespass*.

Cesset Processus. See tit. *Slet. Processus*.

Cessio Bonorum.

WHITTINGHAM v. DE LA RIEU. M. T. 1818. K. B. 2 Chit. Rep. 53
A rule nisi had been obtained for the discharge of the defendant, who had been arrested for goods sold under the following circumstances. An order for the goods had been given in London, but the delivery itself was partly in Guernsey and partly in London. The defendant, residing in Guernsey, made a surrender of all his property and goods to his creditors, which in that country amounts to a release of all debts. The plaintiff proved his debt there. It was contended that as the defendant was absolutely discharged from his debts by the laws of the island of Guernsey, he was entitled to his discharge. *Sed per Cur.* It is a question of law whether the *cessio bonorum* in Guernsey is a discharge of the debt, and therefore it should be put on record and not be decided on affidavit.—Rule discharged.

How far the *cessio bonorum* discharges a debt contracted in Guernsey,

Cession of a Benefice. See tits. *Advowson*; *Ecclesiastical Persons*.

Cestui que trust. See tit. *Trustee*.

Cestui que vie. See tit. *Life Estate for Trustees*.

Cestui que use. See tit. *Trustee*; *Uses and Trusts*.

Challeng. See tit. *Duel*.

Challenge of Jurors. See tit. *Jury*.

Chambers. See tits. *Bail*; *Poor Rates*.

Champerty. See post, tit. *Maintenance and Champerty*.

Chance M'dley. See tit. *Murder*.

Chancery.* See tit. *Decree*.

1. BANEURY PEERAGE. Feb. 1809, cited 2 Selw. N. P. 734. 5th edit. S. P.

LORD FERRERS v. SHIRLEY. Fitzgib. 196. S. P. Doe d. BOWERMAN, v.

SYBOURN. M. T. 1796. K. B. 7 T. R. 2.

In this case, the counsel for the petitioner stated that he would offer in evidence certain depositions taken on a bill filed in the court of Chancery, on the 9th of February, 1040, by Edward, the eldest son of the first Earl of Banbury, an infant, by his next friend. This evidence having been objected to, the following questions were proposed to the judges.

* The chancery of England has various offices and jurisdictions. The most important function is, that which it exercises as a court of equity, usually styled its extraordinary jurisdiction, to distinguish it from those which are termed its ordinary jurisdictions, and are chiefly incident to its ministerial offices, and the privileges of its officers. The exercise of this extraordinary jurisdiction by courts distinct from those usually styled courts of common law, to which the ordinary administration of justice in civil suits is intrusted, seems to be, in a great degree, a peculiarity in the jurisprudence of the country, but pervading the whole system of its judicial polity. The origin of these courts is involved in great obscurity; their authority has been formerly questioned, and the subjects and limits of their jurisdiction were then but imperfectly ascertained. Time has given them full establishment, and their powers and duties have become fixed and acknowledged. If any doubt on the extent of their duties has occurred of late years, it has principally arisen from the liberality with which the courts of common law have noticed, and adopted principles of decision established in courts of equity; a liberality generally conducive to the great ends of justice, but which may lead to great inconvenience, if the whole system of the administration of justice by courts of equity, the extent of their powers and means of proceeding, the subservience of their principles of decision to the principles of the common law, the preference which they have allowed to common law rights where in conscience the parties have stood on equal grounds, and the defect in the powers of the courts of common law arising from their modes of proceeding, should not be fully considered in all their consequences.

In the construction of every system of laws, the principles of natural justice have been first considered, that the great objects of municipal laws have been to enforce the observ-

A bill in chancery is not admissible in courts of law* to prove any facts either alleged or denied in

the bill, therefore, a bill in equity or depositions can not be received in evidence on the trial of an action of ejectment against a party not claiming or deriving, in any manner, under

Upon the trial of an ejectment brought by E. F. against G. H. to recover the possession of an estate, E. F. to prove that C. D., from whom E. F. was descended, was the legitimate son of A. B. offered in evidence a bill in chancery, purporting to have been filed by C. D. 150 years before that time by his next friend, therein styling himself the uncle of the infant, for the purpose of perpetuating testimony of the fact that C. D. was the legitimate son of A. B., and which Bill stated him to be such legitimate son, (but no persons claiming to be heirs at law of A. B., if C. D. was illegitimate, were parties to the suit, the only defendant being a person alleged to have held lands under a lease from A. B. reserving rent to A. B. and his heirs); and also offered in evidence depositions taken in the said cause some of them purporting to be made by persons styling themselves to be relations of A. B.; others styling themselves servants in his family; others styling themselves to be medical persons attendant upon the family; and in the respective depositions stating facts, and declaring that C. D. was the legitimate son of A. B., and that he was in the family of which they were respectively relations, servants, and

ance of those principles, and to provide a positive rule where some rule has been deemed necessary or expedient, and natural justice has prescribed none. It has also been an object of municipal law to establish modes of administering justice. The wisdom of legislators in framing positive laws to answer all the purposes of justice, has ever been found unequal to the subject; and therefore in all countries, those to whom the administration of the laws has been intrusted, have been compelled to have recourse to natural principles, to assist them in the interpretation and application of positive law, and to supply its defects; and this resort to natural principles has been termed judging according to equity. Hence, a distinction has arisen in jurisprudence between positive law and equity; but the administration of both has in most countries been left, at least in their superior courts, to the same tribunal. In prescribing forms of proceeding in courts of justice, human foresight has also been defective; and therefore it has been commonly submitted to the discretion of the courts themselves, to vary or add to established forms, as occasion and the appearance of new cases may have required.

In England a policy somewhat different has prevailed. The Courts established for the ordinary administration of justice, usually styled courts of common law, have, as in other countries, recourse to principles of equity in the interpretation and application of the positive law; but they are bound to established forms of proceeding, are in some degree limited in the objects of their jurisdiction, have been embarrassed by a rigid adherence to rules of decision, originally framed, and in general retained for wise purposes; yet in their application, sometimes incompatible with the principles of natural and universal justice, or not equal to the full application of those principles; and the modes of proceeding in those courts, though admirably calculated for the ordinary purposes of justice, are not in all cases adapted to the full investigation and decision of all intricate and complicated subjects of litigation, which are the result of increase of commerce, of riches, and of luxury, and the consequent variety in the necessities, the ingenuity, and the craft of mankind. Their simplicity, clearness, and precision, are highly advantageous in the ordinary administration of justice; and to alter them materially would probably produce infinite mischief, but some change would have been unavoidable, if the courts of common law had been the only courts of judicature.

Early, therefore, in the history of our jurisprudence, the administration of justice by the ordinary courts appear to have been incomplete, and to supply the defect the courts of equity have exerted their jurisdiction: assuming the power of enforcing the principles upon which the ordinary courts also decide, when the powers of those courts, or their modes of proceeding, are sufficient for the purpose, of preventing those principles, when enforced by the ordinary courts from becoming (contrary to the purpose of their original establishment) instruments of injustice, and of deciding on principles of universal justice, where the interference of a court of judicature is necessary to prevent a wrong, and the positive law, as in the case of trusts, is silent. The courts of equity also administer to the ends of justice, by removing impediments to the fair decision of a question in other courts; by providing for the safety of property in dispute pending a litigation; by preserving property in danger of being dissipated or destroyed by those to whose care it is intrusted, or by persons having immediate but partial interests; by restraining the ascertainment of doubtful rights in a manner productive of irreparable damage; by preventing injury to a third person from the doubtful title of others, and by putting a bound to vexatious and oppressive litigation, and preventing unnecessary multiplicity of suits, and without pronouncing any judgment on the subject, by compelling a discovery or procuring evidence, which may enable other courts to give their judgment; and by preserving testimony when in danger of being lost, before the matter to which it relates can be made the subject of judicial investigation. This establishment, as before observed, has obtained throughout the system of our judicial polity; most of the branches of that system having their peculiar courts of equity, and the court of

medical attendants, reputed so to be. *First question.* Are the bill in equity, the plaintiff and the depositions respectively, or any, and which of them, to be received in the courts below upon the trial of such ejectment* (G. H. not claiming, or deriving in any manner, under either the plaintiff or defendant in the said chancery suits), either as evidence of facts therein alleged, denied, or deposed to, or as declarations respecting pedigree; and are they, or any, and which of them, evidence to be received in the said cause that the parties filing the bill and making the depositions, respectively sustained the characters of uncle, relations, servants, and medical persons, which they describe themselves, therein, sustaining. Answer. Neither the bill in equity, nor the depositions, are to be received in evidence in the courts below on the trial of the ejectment, either as evidence of the facts therein alleged, denied, or deposed to, or as declarations respecting pedigree; neither are any of them evidence that the parties filing the bill, or making the depositions, respectively sustained the character of uncle, relations, servants, and medical persons, which they describe themselves therein sustaining. The judges further added, that it would not make any difference in their opinion, if the bill, stated to have been chancery assuming a general jurisdiction, which extends to cases not within the bounds or beyond the powers of other jurisdictions. The existence of this extraordinary jurisdiction, entirely distinct from the ordinary courts, though frequently considered as an enormity requiring redress, has perhaps produced a purity in the administration of justice which could not have been effected by other means; and it is in truth, in a great degree, a consequence of that jealous anxiety with which the principles and forms established by the common law have been preserved in the ordinary courts as the bulwark of freedom, and of the absolute necessity of preventing the strict adherence to those principles and forms from becoming intolerable.

A suit to the extraordinary jurisdiction of the court of chancery, on behalf of a subject merely, is commenced by preferring a bill, in the nature of a petition, to the lord chancellor, lord keeper, or lords commissioners for the custody of the great seal, or to the king himself in his court of chancery, in case the person holding the seals is a party, or the seals are in the king's hands. But if the suit is instituted on behalf of the crown, or those who partake of its prerogative, or whose rights are under its particular protection as the objects of a public charity, the matter of complaint is offered to the Court by way of information given by the proper officer, and not by way of petition. Except in some few instances, bills and informations have been always in the English language, and a suit preferred in this manner in the court of chancery has been therefore commonly termed a *suit by English bill*, by way of distinction from the proceedings in suits within the ordinary jurisdiction of the court as a court of common law, which till the statute of the 4 Geo. 2. c. 26. were entered and enrolled, more anciently in the French or Norman tongue, and afterwards in the Latin, in the same manner as the pleadings in the other courts of common law.

The following is an alphabetical list of the matters over which the Court of Chancery exercises an equitable jurisdiction.

Accident and mistake. Account. Fraud. Infants. Specific performance of agreements. Trusts.

The principal maxims observed in the administration of the business of these tribunals are:

- 1st. He that will have equity done to him, must do it to the same person.
- 2d. He that hath committed iniquity shall not have equity.
- 3d. Equality is equity.
- 4th. It is equity that that should make satisfaction which received the benefit.
- 5th. It is equity that that should have satisfaction which sustained the loss.
- 6th. Equity suffers not a right to be without a remedy.
- 7th. — relieves against accidents.
- 8th. — prevents mischief.
- 9th. — prevents multiplicity of suits.
- 10th. — regards length of time.
- 11th. — will not suffer double satisfaction to be taken.
- 12th. — suffers not advantage to be taken of a penalty or forfeiture, where compensation can be made.
- 13th. — regards not the circumstances but the substance of the act.
- 14th. Where equity is equal, the law must prevail.

* Though formerly it was thought that a bill in equity followed up by other proceedings was admissible in evidence against the complainant as an admission of the facts therein disclosed; see 1 Sid. 221; 1 Chan. Cas. 64. But the general rule seems to be, that a bill in chancery will not be evidence, except to show that such a bill did exist, and that certain facts were in issue between the parties in order to introduce the answer or the depositions of witnesses; see Fitzgib. 196; Bull. N. P. 235; 7 T. R. 3; 1 Wightw. 325.

filed by C. D. by his next friend, had been a bill seeking relief. *Second question.* Whether any bill in chancery can ever be received as evidence in a court of law, to prove any facts alleged or denied in such bill. Answer. Generally speaking, a bill in chancery cannot be received as evidence in a court of law, to prove any fact either alleged or denied in such bill. But whether any possible case might be put which would form an exception to such general rule, the judges could not undertake to say. *Third question.* Whether depositions, taken in the court of chancery, in consequence of a bill to perpetuate the testimony of witnesses, or otherwise, would be received in evidence to prove the facts sworn to, in the same way and to the same extent as if the same were sworn to at the trial of an ejectment by witnesses then produced. Answer. Such depositions would not be received in evidence in a court of law, in any cause in which the parties were not the same as in the cause in the court of chancery, or did not claim under some; or one of such parties.

But Lord Kenyon is reported to have admitted a bill, filed by an ancestor, to be evidence of a pedigree, there stated as a declaration in the family.

The rule which prohibits the admission of a bill does not apply to an answer;* therefore, a copy of an answer in equity is evidence against the party who made it, and all persons claiming under him.

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Provided there be some evidence of the identity of the parties.

And it does not contain mere matter of hearsay.

When the answer is read it must be taken together,†

2. *TAYLOR v. COLE.* H. T. 1799. K. B. Cited 7 T. R. 3. n.
In this case Lord Kenyon, C. J. held, that a bill in Chancery by an ancestor was evidence to prove a family pedigree stated therein, in the same manner as an inscription on a tomb-stone, or in a bible.

3. *LADY DARTMOUTH v. ROBERTS.* M. T. 1812. K. B. 16 East. 334. S. P. *MEHINS v. MENSIAW.* T. T. 1673. K. B. 1 Vent 212

In an action for not setting out tithe, a question arose, whether copies of an answer to a bill filed in the court of Exchequer, in a suit instituted for tithe-hay, by a vicar against the rector and others, owners of land in the parish, in which answer the defendants disputed the vicar's claim, and declared that the tithes in question belonged to the rector, was admissible in an action for tithes by a succeeding rector against owners or occupiers of the same lands, for the tithes of which the former suit was instituted. The judge who tried the cause admitted the evidence; and on motion for a new trial the court discharged the rule, observing: that an examined copy was sufficient, it being a proceeding in a court of justice, and all proceedings in a court are proveable by an examined copy.

HODKINSON v. WILLIS. E. T. 1813. K. B. 3 Campb. 400.

The copy of an answer to a bill of discovery filed in the court of chancery being produced on a trial concerning a question previously litigated between the parties, it was objected, that it could not be read in the absence of the original, merely on proof that the names of the parties were the same. And Lord Ellenborough, C. J. said: it was established; that the bill in equity was filed by the now defendant against the now plaintiff, he would presume that the answer appearing on the file in chancery was put in by the latter; and would receive an examined copy as evidence of the fact.

5. *Roz dem. PELLATT v. FERRARES.* M. T. 1801. C. P. 2 B. & P. 542.

In this case the defendant having given in evidence an answer in chancery by the lessors of the plaintiff, *Chambre J.* observing: on the degree of proof which the lessors of the plaintiff had drawn from the answer in their own favor, said, it is true that the answer was introduced into the cause by the defendant, in whose behalf some parts of it were received; but as to these parts on which the lessors of the plaintiff relied, they speak only to what they have heard as truth. I think that was not admissible; and, therefore, as part of the answer could not be taken without the whole, it ought to have been rejected. But as this point was not discussed at the trial, we will not disturb the verdict on that ground.

6. *LYNCH v. CLERKE.* H. T. 1695. K. B. 3 Salk. 154.

Per Holt, C. J. If the plaintiff will read the defendant's answer in chancery against him in evidence, the defendant may likewise take advantage thereof, for all is evidence or none.

* An answer (a confession on oath) cannot regularly be given in evidence without proof of the bill, for without the bill there does not appear to be a cause depending. But if there be proof by the proper officer that the bill has been searched for and cannot be found, the answer has been allowed to be read without a production of the bill; see *Gilb. Ev.* 49.

† If on exceptions being taken, a second answer is put in, the defendant may insist on having that read also to explain what he swore in the first; see 1 *Sid.* 418: *Bull. N. P.* 237.

7. THE EARL OF BATH v. BATHERSEA. M. T. 1693. K. B. 5 Mod. 9.

Per Cur. If the defendant give the plaintiff's answer in chancery in evidence, he may insist only to read such part as he will, for it is like examination of witnesses; but then the other side may insist to have the whole read after.

And if only part be offered, the other party is entitled to have the remainder read.

8. SPARIN v. DRAX. M. T. 1674. C. P. cited Bull. N. P. 238.

An answer in chancery of a witness being produced to show him incompetent, he having there sworn that he had an annuity out of the land in question, it was insisted to have the answer read 'through' but the court refused it, as the answer was produced only to show that he was not a competent witness in the cause, and not to prove the issue.

Unless it be produced merely for the purpose of showing

9. GRANT v. JACKSON. M. T. 1793. K. B. Peake. N. P. 204.

Action on a bill of exchange drawn by A. B. It was admitted the defendants were surviving partners. A. B. was also a defendant, but having pleaded bankruptcy, a *nolle prosequi* was entered as to him. At the trial, amongst other evidence, the plaintiff offered A. B.'s answer to a bill filed against him, in Chancery, by other creditors. At the time this answer was sworn, A. B. had become a bankrupt, but had not obtained his certificate.

the incompetency of a witness. [293] In an action by a creditor against

Per Kenyon C. J. This answer is not admissible evidence for all purposes. It could not be received to prove the partnership, but when that was established, the admission may bind all. If A. B. had obtained his certificate, and been discharged by it at the time he put in this answer, I think there would have been a formidable objection to the evidence; but at that time he was equally liable with the others. I do not receive it as evidence of a judicial proceeding, but as a naked admission.

some of a partner to a bill filed by other creditors, is receivable in evidence against the defendants.

See 1 Taunt. 104; 1 Stark. 81; Peake. N. P. 16.

10. ANON. M. T. 1688. C. P. 2 Vent. 72.

Mr. Justice Eyre, at the desire of the Court of K. B., propounded the following question to the Court of C. P. whether, where an infant, being a party to an ejectment, has answered a bill in Chancery by his guardian, such answer can be read in evidence against the defendant? The Court held it could not, because it is unreasonable, that what the guardian swears in his answer should affect the infant.

But an infant's answer in chancery, by guardian, is no evidence at law to effect the infant.*

See Gilb. Ev. 44; 3 P. Wms. 237; Carth. 79; 3 Mod. 259; Stra. 548.

Chap'l. See tit. *Church and Chapel.*

Chaplain. See tit. *Church and Chapel.*

Character. See tit. *Master and Servant; Libel; Slander.*

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Charitableuses. See tit. *Mortmain.*

Charities. See tit. *Mortmain.*

Chart. See tit. *Copyright.*

Charter. See tit. *Corporation.*

Charter-party.†

(A) DEFINITION OF A CHARTER-PARTY, p. 297.

* Although an answer, purporting to be the answer of a minor by his mother and guardian, may be read against the mother in another cause where she is defendant in her own capacity; see 2 Sch. & Lef. 34. But the answer of one defendant is not in general evidence against a co-defendant; see 3 P. Wms. 311; 12 Ves. jun. 361; *sed vide* Grant v. Jackson, *supra*. It seems doubtful whether the answer by a *feme covert* can be used as evidence against her, in an action after the husband's death; see 3 P. Wms. 287; 3 V. & B. 166; at least unless it were adverse to the husband's interest. If a man make an answer in Chancery, which is prejudicial to his estate, it is not evidence against his *alliance*, unless indeed the plaintiff make it evidence by producing it first; 1 Salk. 286; Bul. N. P. 238.

† The term charter-party is generally understood to be a corruption of the Latin words *charta-partita*; see Hargraves' note on the 1st Inst. 229. Pothier, *traite de charte-partie*, Num. 1. gives the same etymology of this word from Bœrius, but with a different explanation. It appears to have been so called from the ancient custom, of first writing

(B) ~~As to the difference between a chartered and a general ship,~~
AND A CHARTER-PARTY AND A BILL OF LADING, p. 297.

(C) ~~As to the difference between an agreement for a charter, and a~~
CHARTER-PARTY, p. 298.

(D) ~~Of the parties to a charter-party, and the interest they have in~~
THE VESSEL.

(a) Of the parties to a charter-party, p. 293. (b) Of the interest the parties to a charter-party have in the vessel, p. 299.

(E) ~~Relative to the stamp,~~ p. 303.

(F) ~~Form of a charter-party.~~

(a) In general, p. 303. (b) As to its being in writing, p. 305. (c) ~~under seal,~~ p. 305. (d) ~~indented,~~ p. 305. (e) As to its date, p. 305. (f) As to the description of the parties, p. 306. (g) ~~vessel, and its burthen,~~ p. 306. (h) ~~voyage,~~ p. 307. (i) As to the penal-clauses in a charter-party, p. 307.

[295] (G) ~~As to the commencement of the operation of a charter-party,~~ p. 309.

(H) ~~As to the construction of charter-parties.~~

(a) In general, p. 309. (b) With reference to particular covenants on the part of the master and owners

1st. *As to covenants and consequent duties appertaining to the due sea-worthiness of the ship.*

1. *As to the sea-worthiness of the ship itself,* p. 313.

2. *due appointment of the ship.*

(1 a) As to her furniture, p. 315. (1 b) — the crew and captain, p. 317. (1 c) — a pilot being provided, p. 319. (1 d) — provisioning the ship, p. 319. (1 e) — papers necessary for the ship, p. 321.

2d. *As to covenants and subsequent duties appertaining to the loading the ship.*

1. *As to proceeding to the loading port.*

(1 a) In general, p. 322. (1 b) As to altering such port when once fixed, p. 323.

2. *As to loading the vessel.*

(1 a) General rule, p. 323. (1 b) As to loading a full and complete cargo, p. 324. (1 c) As to the manner of loading, stowing, &c. p. 326. (1 d) As to what goods the owner is bound under a covenant to load the vessel or receive on board, p. 326.

3d. *As to the covenants and consequent duties appertaining to the commencement and performance of the voyage.*

1. *As to the covenant to sail.*

(1 a) From the port of delivery, p. 327. (2 a) In general, p. 327. (2 b) With the first fair wind, p. 328. (2 c) On or before a certain period, p. 330. (2 d) With convoy, p. 332.

2. *As to the covenant to perform the particular voyage.*

(1 a) In general, p. 341. (1 b) As to its alteration, p. 347. (1 c) As to its abandonment, p. 349.

4th. *As to the covenant relating to the delivery of goods.*

1. *In what cases there must be a delivery,* p. 350.

2. *What delivery is sufficient.*

(1 a) As relates to the place of delivery, p. 353. (1 b) As relates to the parties to whom the delivery is to be made, p. 355. (1 c) As relates to the manner and mode of delivery, p. 356.

(b) *With reference to particular covenants and consequent duties on the part of the hirer of the vessel.*

the contract upon a large skin of parchment, which was then divided into two parts, by being cut in an indented line from top to bottom, of which each of the contracting parties took one: as this indented line took necessarily pass through some word or figure, common to both parties, the exact tallying of the two parts upon relation and comparison was conclusive evidence of their original agreement and correspondence. With the same design, indentation was afterwards introduced, and deeds of more than one part thereby acquired among English lawyers the name of indentures. This practice of division, however, has long been disused, and that of indentation has become a mere form.

1st. To procure a license, p. 358. 2d. To furnish a cargo, p. 362.

(1) AS TO THE EXCEPTIONS USUALLY INTRODUCED INTO CHARTER-PARTIES, LIMITING THE OWNER'S LIABILITY, AND THE REIN OF HIS GENERAL RESPONSIBILITY.

(a) *Of the general liability incurred by the owner or master of a vessel entering into a charter-party*, p. 370.

(b) *Of the exceptions generally introduced into charter-parties*.

1st. As to restraints of princes, and of embargoes, p. 371. 2d. As to perils of the sea, p. 375. 3d. As to embezzlement or barrety, p. 379.

(K) AS TO THE DISSOLUTION OF THE CHARTER-PARTY, p. 380.

(L) AS TO DEMURRAGE, p. 380.

(M) AS TO FREIGHT, p. 380.

(N) AS TO PRIMAGE, PRIVILEGE, AVERAGE, PASSENGERS, PILOTAGE, AND PORT-CHARGES, p. 380.

(O) AS TO THE REMEDIES BY, AND AGAINST, OWNERS AND MASTERS OF VESSELS.

(a) *By action*.

1st. *Of the form of action*.

1. By the owner against the hirer, p. 380. 2. By the hirer against the owner, p. 382.

2d. *Of the cause of action*, p. 383.

3d. *Of the parties to the action*.

1. In general, p. 384. 2. In case of joint and several covenants, p. 387.

4th. *Of the pleadings*.

1. Of the declaration. (1 a) *Of the venue*, p. 388. (2 a) *Of the body of the declaration*, p. 388. 2. As to the subsequent pleadings, p. 390.

5th. *Of the evidence*, p. 392.

6th. *Of the damages*, p. 392.

(b) *Of their lien, see post, tit. "Lien."*

(A) DEFINITION OF A CHARTER-PARTY.

A charter-party of affreightment may be defined to be an agreement in writing under seal or otherwise, between the owner or master of a ship, and the hirer or owner of goods, by which the owner or master of the ship agrees to let the same or the principal part thereof (though generally the whole ship) to the hirer or owner of goods, for the conveyance of them to some destined place or places; such owner of goods paying freight. [297]
What a charter party is.

(B) AS TO THE DIFFERENCE BETWEEN A CHARTERED AND A GENERAL SHIP, AND A CHARTER-PARTY AND A BILL OF LADING.

A merchant who has purchased commodities, and who usually confines his capital and attention to *wholesale trade*, seldom has a ship of his own at command, to bring home the goods which he has purchased. He, therefore resorts to some person who has employed his capital and attention peculiarly in carrying trade. If the quantity of the commodities purchased be very considerable, or the merchant is desirous of making a speculative voyage to foreign parts, to purchase various commodities in one or more ports, he then hires an *entire ship*; if on the other hand, the commodity is not sufficient to occupy an *entire ship*, in general he merely contracts with the ship owner to carry the particular commodity to the port of destination. In the first case it is usual to enter into a formal contract for the hiring of the *entire ship* for some certain voyage, or for a limited period; and this contract is usually termed a *charter-party*, and the ship is termed a *chartered ship*: in the latter instance where the *entire ship* is not hired, she is termed a *general ship*, because it is open and common to all such merchants as choose to load their goods on board; and it is not then usual for the master to sign any contract, but the captain of the vessel usually and in particular, in the course of foreign trade, signs an acknowledgement of having received the goods on board the ship, with a stipulation that the goods shall be safely carried; and which contract is called a *bill of lading*. However, it is by no means true that a charter-party always is, or necessarily must be, a contract for the whole ship, any more than that a bill of lading is only given where there are several articles Difference between a chartered and a general ship, and a charter party and a bill of lading.

or descriptions of merchandize shipped on different accounts. The former may be for the whole or part of the ship; and the latter may be where all the goods on board are of the same sort, and shipped on the same account, and the whole ship is occupied by them.* *Vide* the present *Lord Chief Justice Abbott's* Treatise on Shipping, 183; *Mr. Holt's* Treatise on Shipping, vol. 2. p. 1; *Mr. Lawe's* Treatise on 'Charter-parties, p. 1; and *Mr. Chitty's* Treatise on Commercial Law, vol 3. p. 387.

(C) AS TO THE DIFFERENCE BETWEEN AN AGREEMENT FOR A CHARTER, AND A CHARTER-PARTY.

[298] Difference between an agreement for a charter and a charter party. A memorandum of a charter party, or in other words, heads of agreement for the formation of one, are as common between merchants as charter-parties themselves. In the former case the agreement is not so specific or particular as a charter-party, nor is it under seal. It is, however, equally binding as if a more formal and solemn instrument had been executed, and is frequently the only written contract between the ship-owner and merchant. It is not material, therefore, whether the instrument purport to be a charter-party, or a memorandum, or agreement, for the hire of a ship; see 13 East. 343.

(D) OF THE PARTIES TO A CHARTER-PARTY, AND THE INTEREST THEY HAVE IN THE VESSEL..

(a) Of the parties to a charter-party.

This instrument may be executed either by the principals themselves; or their agents.

1. The parties to a charter-party may be either the principals themselves, or their agents; that is, may be the ship-owners and merchants, or the master and factor. If the charter-party be made at the place of the owner's residence, the former mode is the more usual. If the vessel be hired in a foreign port, the charter-party is usually made by the master for the owner, &c

2. *HORSLEY v. RUSH*. Cited in *HARRISON v. JACKSON*. 7 T. R. 207.

To whom a sufficient power has been delegated,†

This was an action of covenant on a charter-party, to which the defendant pleaded the general issue. It appeared in evidence, that the deed was executed by A. B. by order and for account of Messrs. C. and D.; but that A. B. had only a verbal authority from the defendant to execute the charter-party. *Lord Kenyon* held, that the action could not be maintained, for that a deed could not be executed by an agent so as to bind the principals, unless he were authorized by deed under seal, and that though one partner might bind another by written instruments, he could not do so by deed, without a special power under seal for that purpose.

See 2 East. 142; 1 N. R. 104.

* *Malyn*, p. 97, observes, that no ship should be freighted without a charter-party.

† If a charter-party therefore be executed by a master for his owners, the merchant so hiring the vessel would act only with caution in requiring the master to produce the power of attorney to himself, by which his owners have authorized him to enter into such a deed of charter-party in their name. If the master sign a deed without such previous authority from his owners, the deed of the master is his obligation only, and the merchant has no action against the owner, or least the freighters have not a direct action against the owners, grounded upon any instrument itself. But it must not from this be inferred, that the master is fully competent without any special authority to make a contract of affreightment in writing not under seal, or verbally to bind his owners. And it is clear that they may be sued as owners for a breach of their general duty, if not named in the contract, whether it be under seal or not; *Beawes*. 133. It is also observed by *Beawes*. 139. that if a factor freight a ship by order and for account of another, out and home, and a charter-party be accordingly entered into by indenture between him and the master, the factor is liable for the freight and performance of all the covenants; but if the ship be only freighted outwards, and loaded by the factor, the goods shipped are liable for the freight, and no demands are to be made on the freighters, in virtue of the charter-party; in this case, the person who receives the goods is to pay the freight according to the tenor of the bill of lading. If, therefore, the factors executes this instrument in his own name, he will be personally responsible for the performance of his covenants; but if he executes in the name of his principal under a competent authority to bind him, the principal alone is liable, it being a general rule that in the exercise of an authority under a power of attorney to do any act, the party authorized ought to do the act in the name of him who gave the authority, for as he appoints the person to be his attorney to act in his place and represent his person, that is no authority to do the act in his own name as his own proper act, but in the name and as the act of his principal; 7 T. R. 207; *Mal*. 37; 2 Atk. 622; *Paley's* Principal and Agent. 167, 266; 2 Taunt. 357-8; 3 East. 565; 9 Co. 766; 2 Ld. Raym. 1418; 1 Str. 705; 6

(b) *Of the interest the parties to a charter-party have in the vessel.*

1. THE MASTER, WARDENS, AND ASSISTANTS OF THE TRINITY-HOUSE, v. CLARK. T. T. 1815. K. B. 4 M. & S. 208.

This was an action of *indebitatus assumpsit* by the corporation of the Trinity-house against the defendant, as owner of the ship *Britannia*, for certain light-house duties granted to them by several charters, and for buoyage and beacons on entering the river Thames, payable by the owners of the several vessels. The question which arose was, who was to be considered the owner of the *Britannia* within the meaning of these charters, during the voyages in the course of which the duties, as it was contended, became payable. The decision of that point depended entirely upon the terms of a charter-party between his majesty and the defendant. The charter-party was executed between the defendant and the commissioners for conducting his majesty's transport service, for and on behalf of his majesty. In substance, it was alleged therein, that the defendant granted, and to hire, and freight, let the said ship to the said commissioners, to receive on board, at, &c. all such soldiers, horses, &c. and proceed therewith as she should be directed. The ship was to continue in pay three months certain, and after that, for so long a time as required, until notice of discharge given; and the said commissioners hired or retained the said ship or vessel for the said time accordingly. There then followed the usual covenants, that the ship should be in good condition, and should be well equipped, manned, and otherwise fitted out for the accommodation of those on board; that the master should receive on board the said ship from time to time, such a number of soldiers, horses, &c. as he should be directed, and proceed with them, as he should be directed, and land the same, and so from time to time; in the performance of which, the said master should be aiding and assisting to the utmost of his power, and execute the various duties on board the ship *inter alia*, deliver a log-book on oath, if required, at the transport-office, and give them notice of his arrival at any port. In consideration of which, the commissioners covenanted to pay defendant for hire and freight 20s. a ton each calendar month; to commence on production of a certificate from the inspector, of the ship's being ready to sail. The payments were to be made on the production of a certificate, as follows, "these are to certify the commissioners for conducting his majesty's transport service, that the transport, A. B., master, 500 tons, is at this time in his majesty's service, fit for the service, employed upon and complete, according to the charter, in men and stores; and that the master has behaved himself properly, and was always obedient to command during the time he has been under my directions."—"Given under my hand." The commissioners were to have power to make an abatement in the freight, in case of the ship's inability to proceed (it being to be understood that the owner generally warranted the use of the said ship from any defects or deficiencies of any kind.) The occupation of the different habitable parts of the ship was arranged by the terms of the contract, and a place provided for the residence of the agent of the crown. It T. R. 177; 2 East. 142; 4 T. R. 133; 2 B. & P. 338; 3 East. 111; 5 id. 148. When the ship is chartered by several owners to several persons, the charter-party should be executed by each, or they will not be liable to an action for non-performance of the stipulations; and though for various mercantile purposes one partner may bind his co-partner by signing his name to an instrument not under seal, it is otherwise with respect to instruments under seal, unless authorised by an instrument of as high a nature.

* It must be admitted, however, that the terms made use of in charter-parties, "to charter a ship," are in their general construction equivocal. They may either mean a contract in the nature of a demise of the *hull* of the ship, or a mere contract for the conveyance of goods by which the *space* and *capacity* of the ship are let to the freighter. In the former case, according to the authorities, the chartered-party would have a temporary property and an entire possession, not controlled by the circumstances that the ship-owner furnished a master and crew to navigate the ship; in the latter case the charter-party would not differ from a bill of lading of the *whole* cargo, and the possession would remain in the proprietor of the ship and not in the freighter. Many important points as to the right of lien for freight depend upon this distinction, which will be more accurately considered in a subsequent part of this work. Vide post, tit. "Lien,"

It is a general rule that the owner, not the hire or of a ship, is to be considered as the owner. But there are exceptions to this rule, viz. where by the terms of the charter-party, coupled with the particular nature of the service in which the ship is employed, an intention to vest the temporary property in the chartered party can be inferred.*

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was urged that the use and service only of the ship were parted with, and that the possession and ownership were retained by the conduct and navigation being left to the master and crew, who were the servants of the proprietors, chosen and fed, and paid by them; that the destination of the ship was with the crown, but that the mode of executing the orders of the crown was entrusted to the proprietors of the ship by the means of their servants, the master and crew, over whose conduct, if they execute those orders, the crown had no control; that though the whole tonnage was hired, yet if it were not used by the crown, the proprietors of the ship would be entitled to use it for their own advantage in any way which would not impede the performance of the stipulated service; that the only remedy the crown would have on the refusal of the proprietor of the ship to perform his contract and permit his ship to sail, would be an action on the charter-party; and that the defendant had derived the benefit from these lights and beacons by the additional security afforded to the ship, the loss of which by the perils of the seas, would have been his loss, and not that of the crown.

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Sed per Cur. No argument can arise from the benefits which either party may derive from these lights. Each is interested, and derives a benefit from them. As a general proposition, the doctrine that the character of the ship is the owner *pro hac vice* is hardly denied; but the precise point made here is, that this case is an exception to the general rule. The whole argument, on behalf of the plaintiff, appears to rest on a fallacy. The possession, such as that of the master and crew, is not retained by the proprietor of the ship, to restrain or interfere with the full and free use of the ship, which he has let to hire for a term, but as subsidiary and subservient to such use. It is not only consistent with the entire ownership and possession of the vessel on the part of the crown during the period for which it was let, but it is a farther means provided to enable the crown, fully and beneficially, to enjoy the same by letting at the same time out to the crown the services likewise of those by whom the vessel might be best conducted, under the direction of the crown. But to examine more minutely the exact words used in the deed itself: The charter-party grants the ship, and lets it to hire and freight, which are proper words of lease, and would of themselves pass the possession. A certain term of this hiring is fixed, and a prolongation beyond that term at the pleasure of the hirer. The commissioners are also stated to have hired or retained the ship for the said hire and service. The payment of the freight or hire is to take place on the production of a certificate, the terms of which seem to imply the possession to be in the crown, "to be at this time in the service of his majesty." and according to this notion, the proprietor of the ship is said to "warrant generally the use of the said ship." From all which expressions in the instrument (the terms being proper terms of grant and demise, the sum to be paid being in the nature of rent for the use of a chattel, the whole use of the ship being warranted, the term being sufficiently fixed, and the certificates which the parties are to procure to entitle them to the rent being worded so as to recognize the possession,) and from the nature of the service stipulated for, (it being evident that the service contracted for is of the highest importance to the country, and that its most valuable interests may depend upon the immediate execution of such service, which may be delayed, and even frustrated, if the crown was not authorized to take possession of the ship to secure its immediate execution, but was left to a bare action of covenant against the proprietor of the ship, if he was to refuse to permit his ship to sail,) it is clear that a nonsuit must be entered, seeing that no mischief will be likely to ensue from holding that the crown has a right, under the charter-party, to have the temporary possession of this vessel, which must materially assist in securing the performance of the service contracted for, if the parties or their servants should be unwilling from any cause to comply with the contract, and that the decided cases do not militate against our judgment, the decision in *Rex v. Jones*, 8 East 451, in which it was held that the packet boats between Holyhead and Dublin were rateable to the port, and that the crown was not to be considered as the owner, being

distinguishable from the present, inasmuch as in that case there was no charter-party, no destined term of service, and the captains had a salary, and acted merely as servants, dismissible at pleasure. *See Cowp.* 143.

2. JAMES V. JONES. T. T. 1799. Abbott on Shipping, 23; 3 Esp. N. P. C. [302] 27; S. C. MACKENZIE V. ROWE. Abbott on Shipping, 24; 2 Campb. 482. It often hap

This was an action brought against the defendants, as owners of the ship *Sea Flower*, for the loss of a quantity of raisins, on a voyage from Faro to London. One T., the master of the ship, had in his own name as master, and in the absence of the owners, chartered the ship to Reed and Parkinson, on a voyage from Falmouth to Faro, and back to London; and Reed and Parkinson agreed by the charter-party to provide a full lading from Faro, and to pay a stipulated price per ton. The goods in question were shipped at Faro, by the consent of the agent of Reed and Parkinson at that place, and T., the master, signed a bill of lading, engaging to deliver them to the plaintiff, "he paying freight per charter party." These facts appearing at the trial of the cause before Lord Kenyon, his Lordship was of opinion that Reed and Parkinson were, with respect to the plaintiff, the owners of the ship, *pro hac vice*; that the defendants, Jones and others, were not responsible to him, and consequently that the defendant could not maintain his action. Under this opinion the plaintiff and his counsel acquiesced, and did not apply to the court for a further consideration of the subject

3. PARISH V CRAWFORD. Abbott on Shipping, 22; S. C. 2 Str. 1251.

An action was brought against the defendant, as owner of a ship, upon a promise alleged to have been made by him to the plaintiff to convey in his ship a quantity of moidores from London to Barbadoes, which had not been delivered there. The facts of the case were, that the defendant, the owner, had chartered the ship to one Fletcher for the voyage in question, for a certain sum, and Fletcher was to have the freight of goods, but the freight of passengers was reserved to the defendant; and the defendant appointed the master, and covenanted with Fletcher for the condition of the ship, and behaviour of the master. Fletcher took on board the moidores and other goods of the plaintiff and other persons, and received the freight for them. For the defendant it was objected, that although the ship was his property, yet he was not the owner in such a manner as to be liable to such action, but that Fletcher was, for this purpose, the owner. Lee, C. J. however, before whom the cause was tried, was of opinion that the action might be maintained; and the plaintiff recovered damages to the value of the ship and freight. The sentiments delivered on this occasion by the chief justice were as follows: the true consideration is, whether by any thing done by Crawford, who is confessedly the owner of the vessel in chartering it to Fletcher, he has discharged himself as owner. Crawford considers himself as the governor of the ship, and so covenants for the government of it during the voyage, and the ship was navigated by his master. Upon what foundation then is an owner chargeable, but upon these two considerations. 1st, The benefit arising from the ship, which is the equit

* The two former cases are inconsistent with the above case. But they are conformable to the principles of a judgment pronounced by the Court of K. B. in a former case on a question of insurance, wherein it was decided, that a deviation committed by the master with the knowledge of the absolute owner, and which therefore could not, according to the law of England, be an act of barratry with respect to him, was an act of barratry with respect to a third person, who had hired the ship by a charter-party, and who was considered as owner for the particular voyage with relation to the subject of that cause; *Cowp.* 143. They are conformable also to the principle of another recent decision of the same court. The registered owner of a ship let the vessel at a certain rent to the person who acted as master. The person ordered stores, which were supplied for the use of the ship, and for which an action was brought against the registered owner; but it was held that he was not answerable, because the master was not his servant, nor was the order given on his behalf; *Fraser v. Marsh*, 2 Camp. 517; and 18 East. 238. And probably the case of *Parish v. Crawford* is not to be considered as law; for although the absolute owner might in each of these three cases be ultimately answerable to the charterer of the ship, yet there was no contract either express or implied, between him and the proprietors of the goods; see *Abbot*, 24.

But as different decisions have taken place it is proper to notice them here.*

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able motive. 2dly, The having the direction of the person who navigates it. And it is upon these two things taken together, that the implied contract arises. Though Crawford has not that freight which the merchant pays for the goods, yet as he has the benefit of the freight in general, he has that equitable motive which makes him liable. With regard to Fletcher, what Crawford has done, is only giving him a power to put goods on board. And it seems to me, the makers of the act of parliament could not have any notion of such an owner of the ship, for it speaks generally of owners of ships; but this Fletcher is not to be considered as owner of the ship in any light, but only as having a power to make use of it this way. If this was to be considered in the nature of a mortgage, it would be delivering up the ship for such a time as the mortgage should be in force. Therefore, I think, there is nothing appearing upon the evidence, that discharges Crawford as the owner of the ship. In *Hutton v. Bragg*; 2 Marsh. Rep.

(E) RELATIVE TO THE STAMP.

The stamp upon a charter party, &c. is 1l. 15s.,* and if it contain 2160 words over and above the first 1080, 1l. 5s.† By the statute 55 Geo. 3. c. 184. a stamp duty of 1l. 15s. is imposed on a charter-party, or any agreement or contract for the charter of any ship or vessel, or any memorandum, letter, or other writing, between the captain, master, or owner, of any ship or vessel, and any other person, for or relating to the freight or conveyance of any money, goods, or effects, on board such ship or vessel. And where the same, together with any schedule, receipt, or other matter, put or indorsed thereon, or annexed thereto, shall contain 2160 words or upwards, then for every entire quantity of 1080 words contained therein, over and above the first 1080 words, a further *progressive* duty of 1l. 5s. See 1 T. R. 735; 2 T. R. 739; 5 T. R. 163; 6 East. 530; 2 id. 168; 3 Taunt. 65.

(F) RELATIVE TO THE FORM OF A CHARTER-PARTY.

(a) *In general.*

No particular set of words is necessary to constitute a deed of charter. [304] It is almost unnecessary to observe, that the contracts of charter-party, like all others, require no *formula* of words, but vary according to the circumstances of the case, and the intention of the parties. Hence, although it is usual, it is unnecessary nevertheless, to describe the instrument as a charter-party of affreightment, or memorandum for charter, or the like, in the beginning of it. If the object or intent of the contract appear from the provisions it contains, that is sufficient; and if it be not apparent from them, no description of the instrument can supply the defect, though many things may be implied from the necessary operation and effect of that which is expressed in the instrument. The great chartered companies, and the public boards, have mostly forms of their own, and merchants are constantly in the habit of varying their charter-parties, according to the nature of their trade, and the particular exigencies of such adventure; see Beawes, 141. 5th ed. According to the usual form of the East India Company's charter-parties, a ship is now let to the company for the voyage therein mentioned, in trade, and also in warfare, and on any other service whatever, as the company, or any of their governors, &c. shall require or direct; and it is provided, that during the stay in India, the company's presidents, &c. shall have liberty to employ the ship in trade, and also in warfare, and otherwise howsoever, and shall have liberty to let the ship out to freight for the company's sole benefit; and that the ship shall be furnished and armed with a certain number of guns, &c. specified in the charter-party; and power is given to the company, their presidents, &c. to remove, restore, and continue the master of the ship; but if the master, or other officer, be displaced or removed, then the next in degree to the person removed, who shall be approved by the President, &c. shall succeed to the employment. Under the orders of the company's presidencies in India, the ship *Bashbridge* was made to form a part of a military expedition, intended for an attack upon *Manilla*, in conjunction with some of his Majesty's ships; her upper works were considerably al-

* By the 44 Geo. 3. c. 98. sched. A. p. 887; and the 48 Geo. 3. c. 149. sched. part I. this duty was 1l. 10s.

† By the 44 Geo. 3. c. 98. sched. A. p. 888; and the 49 Geo. 3. c. 149. sched. part I. this duty was 1l.

tered to enable her to carry a greater number of guns, her complement of seamen was much increased, soldiers were taken on board, a king's officer assumed the effective command, and hoisted the king's pendant, and the ship sailed from Calcutta to Madras, and from thence to Prince of Wales's Island: the expedition, however, was abandoned, in consequence of a peace with Spain. The expense of the alteration of the ship was defrayed by the company, and an allowance was made to the master for entertaining the king's officer and his suite. The ship sustained some damage in the service, and repairs became necessary on her return to Bengal, which were made, and she returned to England with her cargo. The owners contended that this employment of the ship was not warranted by the charter-party, and that they were entitled to a separate and distinct payment in respect of it. The company insisted that the ship was, during the whole time, employed under the charter-party, and to be paid according to the provisions thereof. The court was of the latter opinion, and decided accordingly. See 13 East. 290; and Abbott on Shipping, 220; Beawes' Lex Merc. Doug. 273; 10 East, 468; 3 East. 233; 2 N. R. 182; and Petersdorff's Index, tit. "Charter-party," and post, Appendix.

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It is, however, in writing;

(b) *As to its being in writing.*

A charter-party is universally in writing.

(c) *As to its being under seal.*

A charter-party may be under hand and seal, or under hand only and is as commonly one way as the other; see 1 N. R. 104

But need not be under seal,

(d) *As to being indented.*

Whether a charter-party be expressed to be indented, and whether in fact it be so or not, is wholly immaterial; and, perhaps, even if it were described in pleading, however unnecessarily as a charter-party indented, and it were not expressed to be so on the fact of the instrument, or to have any obvious marks of indentation; and even though it were, in fact, not entered into by deed at all; yet, supposing the proper form of remedy to be adopted, applicable to a simple contract, the incorrect and superfluous statement might be rejected as surplusage, not requiring proof. See 2 Inst. 672; 7 T. R. 7; 4 East. 481.

Or indented.

(e) *As to its date.*

HALL V. CAZENOVE. H. T. 1804. K. B. 4 East. 477.

This was an action on a charter-party, which purported to be dated on the 6th of February. The declaration averred, that it was not executed until the 15th of March. The deed contained a covenant by the owner, that the ship would sail on or before the 12th of February. It was contended, in support of a demurrer to the declaration, that although a party might aver that a deed was delivered, yet that he could not allege that it was indented, made, and concluded after the date. *Sed Per Cur.* We see nothing inconsistent with the deed in such an allegation, any more than if it had been averred that it was sealed and delivered on a day subsequent. It is quite unimportant when it was indented, and equally so when it was made, by which may be understood when it was written. Then the only material word is *concluded*, and a deed can only be said to be *concluded* when it is *delivered*. The time of delivery is the important time, when it takes its effect as a deed; and the case of Stone v. Ball (3 Lev. 348.) is in point to show that the delivery may be after the date. See 2 Salk. 363. 658; 1 Salk. 76.

The date of a charter party is also immaterial, the time of its execution being the only important question. If, therefore, it be impossible to give the charter party effect by regarding the day it bears date, as that of its execution, the party may aver that the instrument was indented, made and concluded on a subsequent day.*

* But if the plaintiff declare upon a deed as dated on a particular day, it shall always be intended that it was delivered at that time and no other: and if in pleading he afterwards state or confess it to have been delivered at any other time, it is a departure from the declaration. Where the plaintiff declared upon an agreement in a charter-party dated the 9th of October, to pay for the corn which *then* was or afterwards should be laden on board the ship, and alleged, that upon the said 9th of October, the ship was laden with 60 lasts of corn, for which the defendant pleaded that the deed was sealed and delivered the 28th of October, and that there was not any corn then or afterwards laden board, with a traverse of the delivery on the 9th of October, or at any time afterwards before the 28th; and on demurrer the plea was holden good, the word *then* being referable to the time when the deed takes effect by delivery and not to the date; Oshey v. Hicks, Cro. Jac. 268; see 3 Lev. 348.

It is usual amongst merchants, although not essential, to state the names and characters of the contracting parties, and the situation of the vessel at the time it is chartered; (Which description will be favorably construed;)

And the name, burthen, and tonnage of the vessel; [307]

And the voyage or voyages on which she is bound.

(f) As to the description of the parties.

1. A charter-party, in its most usual form, begins by specifying the parties between whom it is made, their charter as owner and master of the ship, and the owners of the goods usually called the freighters or merchant. This does not, however, appear to be absolutely necessary; though where the fact is certain, and the instrument is in the form of an indenture *inter partes*, there can be no objection to so doing. It is nevertheless, advisable to adhere to the usual form, as the proof of the ownership of the vessel, if it come into question, may be rendered difficult by the Register Acts; see 4 East. 130; 5 Esp. 88.

2. THOMAS v. CLARKE. M. T. 1818. N. P. 2 Stark. 451.

The defendant in this case entered into a charter-party, in the names of himself and his partner T., but throughout the remainder of the deed omitted to mention the name of T., and merely described them as "*the said freighters.*" It was contended, on the part of the defendant T., that Clarke only was bound by the terms of the charter-party; but the court held, that the introduction of T.'s name in the commencement, was sufficiently indicative of the intent of both parties to be bound.*

(g) As to the description of the vessel, and its burthen.

The name, burthen, or tonnage, of the vessel, and its situation at the time it is chartered, are generally inserted in a charter-party. This mode only accords with universal practice, and is not rendered essential to the validity of the instrument by any authority in our law.† The French Ordinance (Liv. 3. tit. Charte-parties. art. 3.) renders it necessary to specify the burthen of the ship, and provides (Liv. 3. tit. 3. Fret. arts. 4 & 5.) that the master who declares his ship to be of a burthen exceeding the truth, shall answer the merchant in damages; but that an error shall not be deemed to exist unless it exceeds a fortieth part. According to Molloy, (book 2. ch. 4. s. 8.) if a ship be freighted by the ton, and found of less burthen; and if a ship be freighted for 200 tons or *thereabouts*, the addition of *thereabouts*, says the same author, is commonly reduced to be five ton, more or less; see the present Lord Chief Justice Abbott's Treatise on Shipping, p. 149. The wise provisions of the statutes for registering British ships have, however, been productive of two good effects; 1st that they have prevented any mistakes in this matter, and, certainly furnish the means of detecting a wilful misrepresentation; and 2dly, that they have thereby tended to render the practice of mentioning the tonnage more universal, and averted any evils that formerly might have been the consequence of the omission of the statement. Indeed, it is now customary to say so many tons, *register measurement*; see L. C. J. Abbott's Treatise on Shipping, part 1; 2 B. & A. 421; 2 Stark. 452.

(h) As to the description of the voyage.

The simplest form of a charter party is that which merely stipulates for a voyage from one place to another; but it is more usual to charter a ship from an outward and homeward-bound voyage, in which case the whole may be described in the contract and in the construction of it be considered as one voyage, or several voyages; and there is not any reason against inserting the terms and conditions of any number of voyages or adventures in the same

* But where the master of the plaintiff's ship entered into a charter-party as agent for the plaintiff, with the defendant a partner in the house of M. and Co. for the delivery of goods on a stipulated freight, and the goods were delivered to M. and Co. the consignees in the bill of lading, the Court of K. B. determined that the plaintiff could not maintain *assumpsit* against the defendant for freight; Shack v. Anthony, 1 M. & S. 573.

† It certainly is of use, says Mr. Lawes, in his Treatise on Charter-parties, p. 19. to have the burden specified when there is any doubt or question about it; and if it be specified, care should be taken that it is truly stated, as the statement may be otherwise prejudicial. But if there be any doubt about the real burden, the safest way for the freighter is to have an express covenant or warranty respecting it, to which he may have recourse in case the fact should turn out otherwise than as is represented on proving the covenant or warranty to have been false. Without such covenant or warranty, he may have not only to prove the falsehood of the representation or statement in the charter party, but also that it was deceitfully and fraudulently made.

charter-party, so that they be all ascertained and agreed upon at the same time, Beanes (133) observes, that the owners often charter a ship outwards, and leave it to the discretion of the master to procure the best freight he can in the foreign port to which the cargo is consigned. Hence it is not unfrequent to have two or more charter-parties for the same ship, the same voyage, if the adventure outwards and homewards, to and from the several ports at which she may touch, be considered as one voyage.

(i) *As to the penal clauses.*

1. After the usual statement in the charter-party of the names of the parties, the name and burthen of the vessel, and its situation at the time it is chartered, and the lease of the vessel for the voyage, the charter-party proceeds to specify the freight, either in a gross sum for the whole voyage, or a particular sum for every month or week of the ship's employment, or at so much per ton, cask, or bale of goods; *vide post*, tit. Freight. The deed stipulates, on the part of the owner or master, that the ship shall be seaworthy, and in a condition to carry the goods, and shall be provided with all necessities for the intended voyage, both on departure and in the course of it; that the vessel shall be ready by an appointed day to receive the cargo, and shall wait a certain number of days to take it in; that after having received her lading, she shall sail upon the destined voyage the first fair wind, and shall deliver the goods (certain perils and accidents excepted,) at the destined port, to the freighter and his assigns, in as good condition as they were received on board. On the part of the freighter, he contracts to furnish a cargo, and to load and unload the goods within a reasonable time. The times stipulated for that purpose, commonly called lay or running days, are explicitly expressed, as well as the times appointed for the payment of the freight and the manner of such payment, and the sale of and the rates of demurrage per diem, in case of the vessel's detention beyond her lay or running days. The deed then generally concludes with a penal clause, binding the master or owner, and the ship, tackle, and furniture, and sometimes the freight, and the merchant and his goods, in a certain sum, to the performance of the several covenants in the charter-party.

And after the statement of the freight [308] to be paid, and the setting out, the usual covenants on the part of the owner or master, and the freighter, the deed concludes with a penal clause.

2. WINTER v. TRIMMER M. T. 1763. K. B. 1 Bl. 395.

It was argued, that where there is a special penalty in a charter-party, more cannot be recovered than that penalty in an action on the case for breach of the contract. On the opposite side it was contended, that where there is a penalty and covenants in the same deed, the party has his election either to bring debt for the penalty, or action on the covenant for damages.

Per Lord Mansfield, C. J. In the case of Bird v. Randall, which was decided last term (1 Bl. 373.) it was determined, that you may either receive the penalty and rescind the contract, or bring action on the covenants and let the contract stand.—Verdict against the defendant. See 1 Ch. Cas. 226; 2 id. 238; 1 Vern. 350; 3 Atk. 555; 1 Campb. 78.

3. HARRISON v. WRIGHT. H. T. 1811. K. B. 13 East. 343.

This was an action of *assumpsit* upon a memorandum for a charter-party, describing the agreement of the defendant the ship owner, to proceed with all convenient speed to a foreign port, and there load, within 20 running days, all cargo from the plaintiff's factors and therewith return home, and within 15 running days deliver the same, on payment of certain freight, concluding with a certain penalty for non-performance. The question which was now agitated was, whether the plaintiff might recover damages on the breach of the contract, in the defendant not permitting the vessel to proceed on the voyage; beyond the amount of the penalty. The court said, that on looking into the case of Winter v. Trimmer (*supra*), to which they had been referred, it appeared to be exactly in point. There the question immediately was, whether the plaintiff could recover more than the penalty; and it was ruled, that he might. That was followed by the case of Astley v. Weldon (2 B. & P. 346.) in which it was laid down, that the plaintiff had his option either to proceed upon the covenant *toties quoties*, or, upon the first breach, to proceed at once for the made.

As the parties will be presumed to have made an error in their estimate of the possible amount of mischief, and not to have intended that a full equitable satisfaction should not be made. [309]

penalty, out of which he might be satisfied for the damage actually sustained, and which would stand as a security for future breaches. The penalty, therefore, is auxiliary to the enforcing performance of the contract; and the party grieved may either take the penalty as his debt at law, and assign his breach under the statute of 8 & 9 W. 3. c. 11. s. 8. or he may bring his action for damages upon the breach of the contract.* Though, to be sure, the advantage of taking judgment for the penalty as the debt at law, is very much cut down by the statute of William.

A charter party being a deed, the effect of it commences from the delivery.

(G) AS TO THE COMMENCEMENT OF THE OPERATION OF A CHARTER-PARTY. A charter-party, it has been seen (*ante*, p. 305), like every other deed, takes its effect and operation from the day on which it is sealed and delivered, and not from the day on which it bears date, if different from the day of the delivery, unless there be words of reference to the day of the date.

(H) AS TO THE CONSTRUCTION OF CHARTER-PARTIES.

(a) *In general.*

Though the words of a charter party may, in most cases, receive a liberal construction;

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1. *MOFFATT V. THE EAST INDIA COMPANY.* H. T. 1809. K. B. 10 East. 468. This was an action of covenant on a charter-party. The declaration set out a charter-party entered into by the company with the plaintiff, as owner of a certain vessel, containing the usual covenants, amongst which was one to the effect that the company or their agents, should pay to the plaintiff, in *England*, 14*l.* for each passenger ordered on board the said ship, by any of the company's agents, from any of their settlements, &c. in the East Indies. There was also the general stipulation in the deed, that if the ship did not arrive in safety in the Thames, the company should not be liable for freight and demurrage, or for any demands in respect of the ship's earnings in freight voyages for the company, or on account of any other employment. The court held, that this sum was payable by each passenger ordered on board the ship in India by the company's agents, notwithstanding the loss of the ship before her arrival in the river Thames; and observed: this decision is guided by the principle that an extra expense was incurred by the owners laying in a stock for the necessary subsistence of the persons ordered on board by the company's agents, which expense is incurred whether the ship arrives or not. Nor is such charge repelled by the stipulation in the charter-party, that if the ship do not arrive in the Thames, the company shall not be liable for the charges above enumerated; as the terms used mean the employment of the ship in any other voyage or adventure, and in no degree apply to the putting of the passengers on board.

Yet it must not be inconsistent with their plain and obvious meaning,

2. *MARSHALL V. DE LA TORRE.* T. T. 1795. K. B. 1 Esp. N. P. C. 367. Action of covenant for demurrage on a charter-party, given "while waiting at *Portsmouth* for convoy, and discharging her convoy at *Barcelona*." The question which was now agitated was, whether the plaintiff could claim demurrage at any places situate betwixt the two places mentioned in the charter-party? Lord Kenyon said, that as this was an action on a deed in which the meaning of the parties was to be collected from the deed itself, it would be dangerous to substitute other words for those used in the deed; such would be to substitute one contract for another, which could not be, even if one was more beneficial than another. The words of the contract only give demurrage while waiting at *Portsmouth*, or discharging at *Barcelona*; and he was therefore of opinion, it could not be claimed during the periods contended for by the plaintiff.—Verdict for the defendant.

3. *GIBBON V. MENDEZ.* M. T. 1818. K. B. 2 B. & A. 17.

* On the other hand, more is not to be paid than the injury actually suffered. But it appears that there may be a difference between the case abridged above and where the penalty is contained in the same clause with the covenant to do the act covenanted to be done; in which case there seems to be more reason for limiting the parties' responsibility to the sum stated; but it is impossible so to limit it when the penalty is not referable to any particular clause, but to the whole agreement, and the plaintiff's demand upon one of the covenants upon which he sues, exceeds the whole penalty; see 5 East. 316; *Mol.* 102; 8 B. & P. 682; 2 B. & P. 353. And as to the distinction between penal and liquidated damages, see *Holt on the Law of Shipping*, 10. n.

The charter-party in this case first provided for the rate at which freight was to be paid; next the time when the earning of it was to commence, and the period when it was to end; and then went on to provide for the time when the freight was to become payable, both of what should become due on the ship's arrival at the destined outward port, and what should subsequently become due after delivery of the cargo, but contained no provision whatever for the payment of any freight until after such arrival. The Court in construing it, held that these provisions constituted but one entire continued covenant, qualified as to the mode of payment, the payment of any freight being made to depend upon the arrival at the outward port, and not at all events. The loss having happened before that arrival, no provision was made by the covenant for the payment of any freight; and as the charter-party did not appear to have defectively stated the intent of the parties, the court would only look at the terms in which the contract itself was expressed.

As the Court will, in all cases, look at the terms in which the instrument itself is expressed;

And will not, in general,

4. SHUBRICK v. SALMOND. H. T. 1765. K. B. 3 Bur. 1637.

It this case it appeared, that the master of a ship had absurdly agreed to reach an island on a day certain, and that if he arrived on that day the merchant should be *absolutely* bound to give him freight; but if later, that it should be optional with the merchant whether he should lose the whole voyage. The court held, that as he had made the engagement he must abide by it.

against express and positive stipulations, though false hard, and absurd;

5. HOLL v. PINSENT. M. T. 1821. C. P. 6 B. Moore. 228.

In an action for money had and received, the defendant claimed to retain a certain sum for brokerage in procuring a charter-party on a vessel of the plaintiff's, at the rate of five per cent., being the rate allowed for commission on charter-parties for voyages of a specific duration. The plaintiff relied on the terms of the charter-party, as constituting a voyage of unlimited extent, determinable at the option of the freighter. On the trial, it appeared from the instrument, that the plaintiffs had, by their agent, the defendant, chartered the ship to government for a certain number of months, "and thenceforward until they should give him notice that she was discharged from such service; such notice to be given after her return to Deptford or Portsmouth;" the freight to be paid at — per month, "*for so long time as the vessel should be continued in*

Nor even explain a charter-party by any memorandum annexed to it.*

* It may be generally premised, that with a view to the interest of trade, and to the exigencies of merchants in remote parts, the law gives as liberal a construction to those deeds as is possible, and occasionally in favour of the manifest will of the parties, dispenses with a rigid exaction of the rules of law as to the construction of deeds; see 12 East. 578; 2 Taunt. 314; 10 East. 555. In conformity with these principles of equitable interpretation, if there should be a breach of any covenant in a charter-party, the courts of law will consider such breach according to its peculiar nature and circumstances; they will not judge the contract to be annulled by the violation of some immaterial covenant, but will consider, under all circumstances, whether such covenant be a condition precedent, or a condition subsequent; whether its subject matter affects the whole covenant, or whether it only impairs and diminishes, takes away some advantage or attaches some inconvenience and loss to the interest of the party affected by such breach. In the first case, that is, where the condition broken is a condition precedent, the courts will, of course, adjudge it to be a total failure of the agreement, and therein a forfeiture of all the stipulations under it. But where the breach only partially affects the main consideration, and can be compensated in damages, the courts will require it to be made the subject of a cross action; see 1 Campb. 377; 10 East. 295; 12 East. 331. But this principle of equitable interpretation of contracts is necessarily limited by certain maxims, to which the courts of common law rigidly adhere, and beyond which they will not explain, nor correct the letter of charter-parties. In cases exceeding the possible limits of this indulgence, the parties, if they suffer any consequences which they did not intend to foresee, must take the consequence of their own ignorance, or negligence, in the construction of their deeds, and must not expect to receive relief at the expence of this established principle of law; see 3 Burr. 1637. *supra*, p. 310. Although, therefore, the courts of law, in the event of any partial breach of covenant will not suffer the ship owner to lose the reward of the greater portion of the service which he may have performed; they will still not extend this indulgence to cases in which a breach apparently partial goes to the whole and main object of the voyage; see 2 Campb. 446. Whether mutual stipulations in a charter-party are or are not dependent one on another, and therefore, whether or not an action lies for one party without previous performance, or offer to perform the stipulations on his side, depends on the nature of the case under consideration. In the construction of such contracts, conditions are to be taken as precedent, subsequent, or independent, according to the fair intention of the parties (to be col-

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his majesty's service." There were further provisions for the payment of freight after the expiration of six, eight, and ten months *during the ship's continuance in the service*. A memorandum was made on the margin of the deed, that notwithstanding the agreement for the discharge of the vessel at Deptford or Portsmouth, the vessel should be discharged at the Cape of Good Hope, *when the service would admit of it*; and there was a provision for payment in respect of the discharge abroad. The plaintiffs had a verdict; and on motion for a new trial, Park, J. held, that the ship was chartered for an indefinite period, dependent on the necessities of the freighter; and that the language of the memorandum (from the instrument); and technical words encountering such intention must yield to it; see 3 M. & S. 308. An offer by one party with an immediate ability of performance to perform a condition precedent in a charter-party, with a refusal to accept it, is equivalent to performance; see 1 T. R. 638. But where by the terms of a charter-party freight was reserved monthly, and payable on the arrival of the ship in her port of discharge, an offer by the owner to perform the voyage, and refusal by the freighter, are not equivalent to actual performance. It may be however here premised, that the contract by charter-party is in general reciprocal, that is mutually obligatory on each party; see 4 East. 477; 8 id. 437; 10 id. 295, 555; 12 id. 381; 4 M. & S. 37.

Under the principle of giving charter-parties a liberal interpretation, the courts have also occasionally relaxed from demanding the strict execution of the letter of the deed, even as respects the voyage, where the deviation has been of a kind in which the consent of the freighter might reasonably be implied; see 11 East. 232; 2 Taunt. 285; Abbott. 211.

There is also a principle to which the Courts universally resort in the interpretation of charter-parties, and by which they will occasionally limit the capacity of the strict letter, and that is the usage of trade, for as the parties are necessarily supposed to be acquainted with usage and customs of merchants in their own particular trade, it is a natural inference, that such usages made a part of the general and understood circumstances under which they contracted, and they are only omitted because supposed to be matter of concession on both sides. The Courts have frequently acted upon this principle, requiring only that the usage should be good, reasonable, and general; in a word, the *law merchant*, and not a bye law, resolution, or agreement, of any mere body or club of mercantile men. But it would seem that such usage will be sufficient if it be universal amongst the company or association to which the two parties to the action, the plaintiff and defendant, belong; see Abbott on Shipping, p. 222.

The charter-parties of the great public companies, and more particularly those of the East India Company, are usually conceived in more rigorous terms than those between private merchants and ship owners; the value of the cargo being so much greater, and the company itself having less opportunity of personal supervision. Accordingly in the interpretation of these charter-parties, there is a wider scope for the indulgent consideration of the courts of law, and they will exercise the indulgence within those limits which will preserve the existence of, and give effect to a liberal and equitable intention upon the part of the company, but without on the other hand departing too widely from the specific stipulations of the parties; see Doug. 277. It is in all cases, indeed, in the power of the parties to make their contract in such terms, that a charter-party may operate as a contract of insurance as well as of affreightment; but a stipulation of this kind is both contrary to the general nature of the deed itself, and is against fairness and reason, the Court in all instances endeavour to elude this construction by presuming that neither party intended such a presumption from the context of the deed.

If the performance of a covenant in any charter-party become impracticable through the act of God, and there is no provision therein exonerating the contractor from performance under such circumstances, he must answer for the breach of it in damages. But if the performance of this covenant be rendered unlawful by his *own* government, the contract is of course dissolved; although, if in consequence of events which happen at a foreign port, the freighter is prevented from furnishing a loading, which he has contracted to furnish, the contract is neither dissolved nor is he excused for not performing it, but must answer the breach in damages; see 2 Vern. 212; 2 B. & P. 295; 3 T. R. 259. In all cases, indeed, where a contract is unlawful, or becomes so after it is so made, or where by performing it, a man would derogate from the public duty which he owes to his country, under such circumstances the non-performance of it is a matter of peremptory obligation, and therefore an excuse in law; see 10 East. 530. It is upon this principle, that no action will lie on a contract made with reference to an illegal voyage; see 3 M. & S. 117; 1 Taunt. 227. But though a covenant in a charter-party in violation of the law may be void, yet it cannot be illegal in the usual sense of that term, if the party be ignorant of the law and does not contemplate any illegality in his share of the contract; see 1 Marsh. 6.; 5 Taunt. 521; 4 Taunt. 856.

See 2 Holt on Shipping, 30; Chitty's Commercial Law, vol. 3. p. 320; and Lawes on Charter-Parties *passim*; 2 B. & P. 164; 2 Ves. 331; 3 Taunt. 254; 6 id. 466; S. C. 2 Marsh. 141.

orandum did not operate in control of the terms of the instrument itself.—Rule refused.

(6) With reference to particular covenants on the part of the master and owners.

1st. As to covenants and consequent duties appertaining to the due appointment and seaworthiness of the ship.*

1. As to the seaworthiness of the ship itself.†

1. HAVELOCK v. GEDDES. H. T. 1809. K. B. 10 East. 555; S. P. RITCHIE v. ATKINSON. M. T. 1818. K. B. 10 East. 295.

The owner generally covenants that the ship shall be seaworthy:

This was an action of covenant on the charter-party for freight. The defendant cravedoyer of the charter-party, by which it appeared that the plaintiff covenanted that the ship should be forthwith made tight, &c. for a voyage of 12 months, and be so kept. The defendants pleaded that she was not forthwith, after the making of the charter-party, made tight, &c., whereby she was hindered from proceeding on the voyage, and detained an unreasonable length of time, during which the defendants were deprived of the use of her, and put to great expence in fitting her for the voyage, and also divers goods on board

The non-performance of [314] which covenant gives the charter party an option of re-

* The first stipulation, and usually the very first clause in every charter-party, is an agreement between the owner, or master, and the merchant, that "the said vessel shall be made, by the said master (or owner) tight, staunch, and strong, sufficiently manned, and every way fitted for the voyage." This covenant, of course, comprehends the body of the vessel, her rigging and furniture, her provisions, and the crew; all of which, therefore, arranged in the above stipulation, to be in every respect fitted for the voyage, and for the due and safe navigation of the ship from her port of lading to her port of delivery. As the master is, therefore, bound to have his ship sufficiently appointed in all these particulars, a deficiency in any of them is a breach of his contract, and an injury for which he is responsible, according to the damage.

† With respect to the seaworthiness of a ship, the most important cases have arisen on questions of policies of insurance. There is, indeed, little distinction to be made between the nature and extent of the obligation from the merchant to the insurer, and that from the shipper to the freighter. Independent of the covenant in the charter-party, which only reaffirms and strengthens the general obligation, there is a strict and implied agreement that the ship shall be seaworthy, and capable of conveying the goods in proper condition; see 2 Ed. Raym. 909; 5 East. 428. *et ante*, p. 84. It is not sufficient that the owner did not know that the ship was not seaworthy, for he ought to know that she was so at the time he chartered her. The sufficiency of the ship is the substratum of the contract between the parties; and a ship not capable of conveying the goods in a proper state, is a failure of the condition precedent to the whole contract. The seaworthiness of the ship is not a question of fraud or good intention, but it is a positive stipulation that the ship shall be so; and, therefore, although the owner may himself have been deceived by the ship-builder, repairer, &c., if the vessel be in fact unseaworthy, have an insufficient bottom, or unsound timbers, it is a breach of a preliminary condition, and is fatal as such to the contract; *vide post*, div. "Of the Liability of Owners resulting from the Charter-party, and the Exceptions usually introduced therein." In *Eden v. Parkinson* (1 Doug. 732.), which was a case on a policy of insurance, Lord Mansfield said: by an implied warranty every ship must be tight, staunch, and strong; but it is sufficient if she be so at the time of her sailing. She may cease to be so in 24 hours after departure, and yet the underwriters will continue to be liable. But if a ship sail upon a voyage, and in a day or two becomes leaky, and foundered, or is obliged to return to port, without any storm, or visible or adequate cause to produce such effect, the presumption is, that she was not seaworthy when she was let out to freight; or sailed, and the jury may draw this conclusion; *Munro v. Vardam*, Park, on Ins. 333. The principles of law applicable to this implied warranty of seaworthiness, whether as respects the merchant, freighter, or insurer, have lately been fully recognized and adopted by several cases upon appeal, from Scotland, in the House of Lords. The facts of those cases are not material, but in one case, with reference to a policy of insurance, and by analogy, therefore, to a contract of charter-party for freight, it was stated to be a clear and established principle, that if a ship be seaworthy at the commencement of her voyage, though she become otherwise in an hour from that time, the warranty is complied with, and the underwriter liable; *Watson v. Clerk*, 1 Dow. 336. and *Park*, 334: but in the same case it was also said, by two noble lords; "that when the inability of a ship to perform the voyage becomes evident immediately after leaving port, or in a short time after the risk commences, without any apparent cause of injury, the presumption is, that this inability has arisen from causes existing before her setting sail on the intended voyage, and that the ship was not then seaworthy; and the *onus probandi*, in such a case, is thrown upon the assured to show that the inability arose from causes subsequent to the commencement of the voyage." But, as every man is presumed to know his duty, and to discharge it, it is a presumption of law, that every ship, whether chartered or insured, is seaworthy, and the negative is to be proved in an action against the owner. The decision, however, in the above

repudiating her, belonging to them, were damaged. The court held, on demurrer to this plea, that the defendants could not insist, that the forthwith making the ship tight, was a condition precedent to the recovery of freight, especially as they had not immediately repudiated the ship, but taken her into service, and employed her for several months.* See 6 T. R. 668; 8 id. 370; 1 H. Bl. 273.

2. *HAVELOCK v. GEDDES*. H. T. 1809, K. B. 10 East. 555.

A fortiori This was an action on the same charter-party as alluded to in the preceding case. A plea stated, that during the 12 months mentioned in the charter-party, goods were shipped on board the vessel, and that she was not then tight, &c. but the contrary; in consequence of which it became necessary to unload the goods, and repair her, whereby the ship was unemployed for the greatest part of the time, and the defendants paid for the use of her during the rest of the time. It was, however, perfectly consistent with the said pleas, that the ship might have been thoroughly repaired immediately after the execution of the charter-party, and when the defendants took her into their service, but that she became out of repair from an accident while in their employ, and not by the fault of the plaintiff. The court were therefore of opinion, that the defendants had no right to deduct any thing out of the freight. In the course of things, it might be expected that the ship should want repairs in a twelvemonth's voyage, and when the defendants were making their bargain, they should have stipulated to deduct for the time necessary to make these repairs.†

case, does not destroy the doctrine, that the ship is *prima facie* to be deemed seaworthy, but merely, that when a ship, soon after sailing, is found unfit to proceed, the question must be decided by some evidence, or natural inference from the circumstances; *Parker v. Potts*, 2 Dow. 23. In the House of Lords, it has also been adjudged, that a vessel cannot be deemed seaworthy for a foreign voyage *without knees*; *Watt v. Morris*, 1 Dow. 32; and see 2 Holt on Shipping, 82.

* Had the plaintiff's neglect, in the above case, precluded the defendants from making use of the vessel, it might have gone to the whole consideration, and been insisted on as an entire bar; but as the defendants had some use of the vessel, it could only be considered as going to a part of the consideration, and therefore merely gave the defendant a remedy for such damages as they sustained by the plaintiff's neglect, for otherwise the neglect of putting in a single nail, for a single moment, might prevent the recovery of any freight. Besides by this mode of proceeding, the extent of the service rendered, or of the injury sustained, in damage to the cargo, by the unseaworthiness of the ship, is necessarily brought more distinctly to the attention of the court and jury, than when joined together in the same action, and one is pleaded in diminution of the other. This, indeed, appears to be the general and equitable principle of cross actions, not only as respects this subject, but all others, that unless the non-performance, negligence, or misfeasance, alleged in breach of the covenant, go to the whole root and consideration of it, the covenant broken, is not to be considered as a condition precedent, but as a distinct covenant, for the breach of which the party injured may be compensated in damages; see 6 Taunt. 65; 12 East. 381; 4 Campb. 119.

† It seems advisable for the master, or owner of the ship, only to contract to keep the ship tight, &c. during the voyage, to the best of their endeavours, as it may sometimes be wholly out of their power fully to attain that object. Without such stipulation they will be liable to an action on their covenant, if there be not a strict performance of it, though they may not be at all in fault; but such a stipulation will secure them from litigation in that event. By one of the laws of Wisby, it is provided, that in case the master be at the charge of repairing the ship, or of buying any thing for the service thereof, he shall be reimbursed, and every part-owner shall pay his share; Leg. Wis. 65. And, by the common law, if nothing be said in the charter-party, or agreement of affreightment, respecting the repairs; but there is the usual stipulation that the ship shall be and continue tight, &c., the whole expence must be ultimately borne by the owners of the vessel. It is, indeed, sufficiently hard upon the freighter, that if repairs be wanting, and part of the time for which the ship is freighted be spent in making them, he is to have no compensation or allowance on that account, without making him contribute to the expence of repairing the ship of the owners.

Such covenants exempt the freighter from general average loss on the ship; and where it is agreed, that the ship shall, at the expence of the owners, be kept strong and tight during the whole of the voyage, and it appears by the whole instrument, that it was the intention of the parties that the defendant should not bear any expence in keeping the ship in repair, but that every thing necessary to enable the ship to perform her voyage should be provided for by her owners, expences incurred, as necessary in order to put the ship in a condition to complete the voyage, must be borne by the owner, who undertook to make the

2. As to the due appointment of the ship.

(1 a) As to her furniture.

It is, of course, the duty, and generally composes one of the covenants on the part of the charterer, not only to provide a vessel tight and staunch, but to furnish her with all tackle and apparel necessary for the intended voyage; for if the freighter suffer loss or damage by reason of any insufficiency of these particulars at the outset of the voyage, he will be entitled to a recompence. It has been observed, that an insufficiency in the furniture of the ship cannot easily be unknown to the master or owners; but in the body there may be latent defects unknown to both. However, defects of this sort cannot exist, unless occasioned by the age or particular employment of the ship, or some accidental disaster that may have happened to it, which ought to be, and is, probably, known to the owner as well as the master, and should lead to an examination of her interior as well as her exterior parts. In the case of a general ship, it is the duty of the master to provide ropes, &c. proper for the reception of the goods into the ship; and she must also be furnished with proper dunnage, or pieces of wood placed against the sides or bottom of the hold, to preserve the cargo from the effects of leakage, according to its nature and quality. These things are frequently contracted for by an express clause in charter parties, and may, perhaps, be considered as part of the necessary furniture of a chartered ship, without any express stipulation.* See Emerigon. tom. 1. p. 373. 374. 375; Roccus. not. 19. 57. 69; Ordinance of Rotterdam, 2; Magens. p. 101. art 124; Molloy. b. 2. ch. 2. sec. 10; Wellwood's Sea Laws, tit. 7. p. 22; Pothier's Traite de Charte-partie, num. 30; and Pothier's Traite de Louge, part 2. ch. 1. sec. 4. par. 2.

There is also usually a covenant that the ship's furniture shall be complete; [316]

2. WIDDERBURN v. BELL. M. T. 1807. K. B. 1 Campb. N. P. C. 1.

The defence to this action, which was brought on a policy of insurance on board a vessel, was, that she was not properly equipped with sails.—It appeared, that her sails to be used in stormy weather were in good condition, but that her main-top-gallant sail and studding sail, which are useful in light breezes, were extremely rotten, and almost quite unserviceable; the want of which, it was urged, might have occasioned the loss of the vessel, as according to the terms of the policy, she sailed with convoy, but afterwards parted from the fleet, and was never more heard of.

And if she be deficient in any particular relating thereto, as for instance in her sails,† the owner must answer in damages;

Per Lord Ellenborough. It was a condition precedent to the policy attaching repairs, and cannot be thrown upon the merchant, as in a case of general average; 8 T. R. 509. In the case cited, it was agreed between the parties, that in the event of any of the goods being thrown overboard for the preservation of the ship or cargo, the defendant should contribute his proportion of a general average in respect of such goods; which, of itself, afforded a strong argument that he was not to be liable to general average in other cases.

* With respect to general ships, the laws of Oleron and Wisby have the following provisions as the necessity of furnishing the vessel with good cordage, &c. that when the master freights a ship he ought to show his merchants the cordage that belongs to her, and if they see any thing amiss or wanting he must rectify it; and if for want of good cordage any pipe, hoghead, &c. should be spoiled or lost, the master and mariners shall make it good to the merchants; likewise if the ropes or slings break, the master not having showed them to the merchants, he shall make satisfaction for the damage; but if the merchants say that the cordage is good and sufficient, and are satisfied therewith, and afterwards it happens that they break, in that case each of them shall share the damage, viz. the merchant to whom the goods belong, and the master of the ship with his mariners; Leg. Ol. 10; Leg. Wis. 22. 49. But, however the case may be with a general ship, it is clearly unnecessary for the master of a chartered one to consult the freighter as to the sufficiency of the cordage; each party is bound to look to the performance of his part of the express contract contained in the charter-party; nor can any thing which passes between them verbally discharge either from his obligation, unless it be in the nature of a release from it, and intended as such.

It may be here observed, that if the owner of a chartered vessel carry the flag of other countries, and not his own, he must answer for any evil consequences arising therefrom, for it has been well observed, that as goods should be marked that they may be delivered to the owner, so ships should bear their proper flag, that they may be discerned one from another; see Mal. 99.

† Or ground tackling, so as to be incapacitated to encounter the ordinary perils of the sea; Wilkie v. Geddes, 8 Dow. 57.

[317] ing, not only that the ship is tight, staunch, and strong, properly equipped with sails and other sheets and manned with a sufficient crew to navigate her on the voyage insured, but that she should be supplied with such sails as were essential to her safety from the perils of the sea, and which might enable her, if not intercepted, from, at some period or another, completing her voyage. A person who underwrites a policy upon her has a right to expect that she shall be so equipped with sails that she may be able to keep up with the convoy, and get to her port of destination with reasonable expedition. She must be rendered as secure as possible from capture by the enemy, as well as from the danger of the winds and waves. The defendant is, therefore; under the circumstances of this case, entitled to a verdict.

(1 b) *As to the crew and captain.*

1. LAW V. HOLLINGSWORTH. H. T. 1797. K. B. 7 T. R. 160.

And also that her crew be sufficient to navigate her both as to number and as to skill; which is, however a duty implied by common law, under the general terms of the sufficiency of the ship.

In this case, which was an action against an underwriter on a ship and cargo, and in which it appeared that the vessel had been lost when there was no pilot on board, at the period when there ought to have been such, Lord Kenyon made use of the following observations: the principle on which this case must be determined seems to be admitted on all hands; viz. that the assured cannot recover on a policy of assurance, unless the ship be equipped with every thing necessary to her navigation during the voyage. The ship herself must have a sufficient crew, and a captain and pilot of competent skill. I do not feel that I am bound, in this case, to decide, whether or not it be necessary that there should be on board the vessel a pilot qualified according to the act of parliament referred to. This case may be disposed of without deciding that question, as there was, in fact, no pilot on board the vessel when the accident happened; in which view of the case there must be judgment of non-suit. See Sel. N. P. 937. n.

2. BEATSON V. SCHANK. H. T. 1803. K. B. 4 East. 233.

The parties may enlarge their covenants in this respect if they please by express obligations, and in such cases, the law will enforce them as strictly as its terms.

It appears in this case, that a charter-party (which was for the hire of a ship on the transport service for twelve months), stipulated that the vessel was to be manned in the proportion of five men and a boy to a 100 tons, and that the whole number of men should be constantly on board, and a regular book kept of their entries and discharges, &c. A certain sum was payable for freight for 12 months, provided she should not be lost or captured within the time. But the defendant's plea to part of the money claimed for freight, stated a clause in the charter-party, that provided, that upon its being made to appear that the ship was unable to execute or proceed on the service, the commissioners should be at liberty to make such abatement out of the freight as they should adjudge reasonable. The plea then stated, that by such inability the ship was detained so many days at Quebec, which appearing to the commissioners, they made an abatement of so much. The question was, whether a deficiency of the crew in consequence of sickness, death, and desertion arising from fear of a distemper, was an inability of the ship, so as to give jurisdiction to the commissioners to make an abatement? It was agreed, that *the ship's inability to execute or proceed on the service* could not mean inability in the abstract, from whatever cause it might arise, but must, in reason, be confined to an intrinsic inability of the ship itself to perform the stipulated voyage and service, as, from not being seaworthy, want of necessary apparel, and the like; that nothing of the kind existed in this case before the court, but that it was merely found, that during the voyage sickness had taken place on board, without any default of the master, and made such ravages among the crew, that the farther prosecution of the service, for a certain time, had become physically impossible, for want of a sufficient number of sailors to navigate her. But the court said: the terms used in the clause under discussion are certainly large enough to include cases which might, or might not, happen from default. The inability of a vessel may happen from various causes; from wilful misconduct or neglect, from necessity, or mixed causes. In all these cases the commissioners were to form their judgment, and might mulct or make abatement, as they should think fit or reasonable under the circumstances, they being consti-

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tuted arbitrators or judges as between the ship-owner and the public. Upon looking accurately into the charter-party, this is not the only instance to be found where the plaintiff, by the very terms of his a greement, was liable to suffer from the act of God, for he expressly covenants, that the whole number of the crew shall be constantly on board. He took upon himself, therefore, to keep up a certain number of men at all events, and was therefore bound to provide against the contingency of any of them dying; as, by taking an extra number of hands on board. It was no improbable event, that disease might take off some in the course of a long voyage; but if the owner will enter into such a covenant, he must provide accordingly. The desertion of the men might, or might not, be the cause of the ship's inability to proceed on the service, and it might, or might not, happen by default of the master; of that the commissioners were to judge. The fact, however, of the ship's inability to proceed is expressly stated, which is one of the causes for which, by the terms of the proviso, the commissioners were to be at liberty to mulct or make abatement in the freight. We must, therefore, as we think, say, that the want of hands to navigate the ship was an inability of the ship to execute or proceed on the service; and that, consequently, the commissioners had jurisdiction to make the abatement which they did.—Judgment for the defendant. See Doug. 271.

3. WYNNE v. FELLOWS. M. T. 1691. K. B. 1 Show. 334.

It appeared in this case, that the master of a vessel had covenanted that she should be well furnished with men, and that the freighter had covenanted that she should return within a given time. This was an action on the latter covenant, for not returning in time. The defendant pleaded, that the ship was, at her departure, manned with the master, seven men, and a boy, and that she then sailed on her voyage to Jamaica, when six of the seamen left the ship, and that the master did not provide others in their room, whereby she was detained so long at Jamaica, that she could not get back within the appointed time.* The court held this a good plea, as the non-performance of the plaintiff's covenant, in such case, disabled the defendant from performing this covenant.

4. TATE v. LEVI. M. T. 1811. K. R. 14. East. 481.

The court held in this suit, which was an insurance case, that there was a failure of the implied warranty, that a captain and crew, of competent skill and knowledge for a voyage, should be provided, the captain being so ignorant as not to know Tarragona from Barcelona; the warranty in the policy being, that the vessel should not go higher up the Mediterranean than Tarragona. It has been decided, that the captain was not possessed of the necessary knowledge, when he was so grossly ignorant as not to know Tarragona from Barcelona.

(1 c) *As to a pilot being provided.*

It is part of the duty of the charterer of a vessel to take care that a pilot be taken on board, in case of sailing down rivers, out of harbours, or through roads &c. when either by usage, or by the laws of the country, a pilot is required;†

* The covenant that a ship shall be well furnished with men, therefore, means not merely that a sufficient number shall be taken on board, but that such number shall be provided, and kept on board her, during the whole voyage. By the laws of Oleron and Wisly, nauts gene if a master turn a mariner out of a ship, upon any difference or disagreement between them, notwithstanding an offer to make satisfaction, and take not another mariner into the ship in his stead as able as the first, and the ship and lading happen to be, through any misfortune, damaged, the master shall make good the loss or damage, if it happen for want of to have a the assistance of the mariner turned out of the ship; Leg. Ol. 18 Leg. This applies to a pilot on general ship; but in case of one chartered, with the usual clauses, the master is liable to board, an action upon this covenant, if he either omit to take a sufficient number of able seamen when necessary on board, or improperly cause them to leave the ship before the voyage is finished, or do any thing by the not provide others in their room, in case of misconduct or desertion; see *Laws on Charter-party*, p. 81.

† But it has been already seen, *ante*, p. 145, that no owner or master of any ship or vessel is answerable for any loss or damage by reason of no pilot being on board, unless it is proved, that the want of a pilot arose from any refusal to take a pilot on board, or from the negligence of the master in not heaving-to for the purpose of taking on board any pilot who shall be ready, and offer to take charge of the ship.

trade, or see 7 T. R. 160; Ordinance of Wisbuy, art. 59. 60; Ordinance of Antwerp, 2 Magens, p. 16. art. 9; Wellwood's Sea Laws, p. 23-26; Ordinance of Rotterdam, 2 Magens, p. 103. art. 139.

1 d. As to provisioning the ship.*

And to take care that the ship be properly provisioned.

A clause is, however, in most cases introduced to that effect, on the part of the charterer. In such case, if payment for provisions or the like, be limited to cease at the time when the ship shall be dispatched from her last port on her return home, that means her last consigned port, in the course of her voyage as directed by the charter-party.

And it may be here noticed that the amount stipulated for in the East India Company's charter parties, in respect of every passenger ordered on board in India by the company's agents, is payable, notwithstanding the loss of the ship.

1. It is of equal importance that the ship should be properly victualled, as that she should be sufficiently manned: therefore, if there be no sufficient supply of fresh water, or other necessary provisions, in proportion to the voyage, the ship is in effect not sea-worthy, or, in other words, not capable of performing the voyage for which she is chartered; and the owner or master is liable to an action for a breach of his contract. The laws of Oleron and Wisby provide, that in voyages wherein wine may be had, the master is obliged to give it to the seamen, and that they shall have but one set meal a day allowed; but where they drink nothing but water, they shall have two meals a day; Leg. Wi. 29; Leg. Ol. 17. And it is declared by those laws that British mariners are entitled to but one meal a day, as they have liquor; but those of Normandy have only water at the ship's allowance; Leg. Ol. 17: However, these rules will not affect a contract by charter-party, which is to be performed according to the usage on similar voyages. Where the language of the charter-party is express and specific, no doubt can arise but that it must be performed accordingly: and where the contract is general or obscure, it will receive a liberal interpretation agreeable to the usage amongst merchants; see *Laws on Charter-parties*, p. 32.

2. *MOFFATT V. THE EAST INDIA COMPANY*. H. T. 1809. K. B. 10. East. 468

By a charter-party between the plaintiff and defendant, the defendants agreed to allow 200*l.* per month for provisions, while the ship remained in India or China, to be computed from her delivery of the company's dispatches (if any) at the ship's "first consigned port, until she be dispatched from her last port in India or China, to return to Europe." The question which now arose was, whether the time which elapsed after her departure from Canton, (which was her last consigned port according to her sailing directions) on her return to Europe, from which course she was driven by stress of weather, and forced to put into Boreday for repairs, before she was again dispatched for Europe, could be included within the term "her last port." *Per Cur.* The payment of the 200*l.* per month, is limited to arise at the time when the ship shall be dispatched from her last port to Europe; and Canton, which was her last consigned port, was properly her last port for the purpose of being despatched to return to Europe within the meaning of the contract.

3. *MOFFAT V. THE EAST INDIA COMPANY*. H. T. 1809. K. B. 10 East. 468

It appeared that there was a contract in a charter-party, executed between the plaintiff and the East India Company, by which the latter covenanted to pay 14*l.* to the ship-owner in England, for each passenger ordered on board the ship in India by the company's agents. The ship had been lost before her arrival in the Thames, which it was contended did away with the liability of the East India Company, as the subsequent arrival of the ship in England was clearly a condition precedent to the payment of the money; and that besides, it was expressly stipulated, that if the ship did not arrive in safety in the river Thames, &c. the company should not be liable to pay any of the sums specified for freight or demurrage, nor be subject to any demands of the owners or masters on account of any other employment; and that such a decision of the court would only coincide with their uniform opinion on questions relating to freight, to which the covenant under discussion appertained. *Per Cur.* The 14*l.* is to be paid in England, for each passenger ordered on board the ship, not for each passenger who should be brought to England; and it was meant to be a compensation for providing diet, and accommodation for the passengers, which expence would at all events, be incurred, whether the ship arrived

* No universal or precise usage need be shown as to the quantity or quality of the stores furnished to such vessels, or the like; but it would be sufficient to show what was the prevalent usage amongst merchants in this respect, and that the ship was fitted according to it.

or were lost. And we do not think this demand is at all affected by the stipulation referred in the charter-party, that if the ship do not arrive in safety in the Thames, &c. the company shall not be liable for the freight and demurrage agreed on, or for any demands on account of the ship's earnings in freight voyages for the company, or on account of *any other employment*; for, construing the latter words according to the context, it means the *employment* of the ship in any other voyage or adventure; and we know that the company reserve to themselves the power of employing their chartered ships on other accounts than in ordinary voyages, as in warfare.

(1 e) *as to papers necessary for the ship.*

LEVY v. COSTERTON. H. T. 1816. N. P. 1 Stark. 212; S. C. 4 Campb. 389; S. C. Holt. N. P. C. 167.

Covenant for not providing a bill of health, whereby the vessel was prevented from entering the port to which she was bound, and considerable delay was incurred. The charter-party, after the usual covenant for the vessel's tightness, &c. contained one that she should be furnished with "every thing needful and necessary† for such ship, and for the voyage therein mentioned." It appeared that at Sardina, whether the ship was destined, an invariable and acknowledged practice obtained to require from vessels of all countries a bill of health, previous to their admission into the ports of that island; and that for want of such a document, the ship was compelled to perform quarantine, and was thereby delayed in her voyage. *Gibbs, C. J.* held, that in the spirit of the covenant, the defendant agreed to provide whatever might be essential to the regular completion of the voyage, and as the defendant was aware that the bill of health would be indispensable to that end, the covenant had not been performed.—Verdict for plaintiff.

2d. *As to covenants and subsequent duties appertaining to loading the ship.**

1. *As to proceeding to the loading port.*

(1 a) *In general.*

1. When all things are prepared as stated in the preceeding part of this subject, the next duty of the owner and master respects the loading the ship, that is, the receiving and stowing the goods in a due and seaman-like manner. When the ship is not in a situation to receive on board a cargo at the time she is cleared, but is to proceed to some other port or place for that purpose, this is generally specified, and the master must forthwith obtain the necessary clearances, or permission to sail, from the officer of the customs, or others appointed for the discharge of vessels, and pay (*Guidon. ch. 5. art. 23; Molloy. book 2. ch. 2. sect. 9.*) the necessary port and other charges for that purpose, unless it is otherwise provided by the charter-party.

This, observes Mr. Lawes, in his *Treatise on Charter-parties*, which is certainly the master's duty in the case of a general ship where there is no charter-party, seems to be implied in the covenant to sail according to the provisions of the charter-party, where there is one, for that must mean a lawful sailing, and obliges the party to do every thing in his power to accomplish it.

2. SHUBRICK v. SALMOND. H. T. 1765. K. B. 3. Burr. 1637.

* It may be here as a general rule observed, that the master must take on board no false or coloured papers, that may subject the ship to capture or detention; *Guidon. ch. 5. art. 23; Molloy. book 2. ch. 2. sec. 9;* and, as a general rule, he must procure and keep on board all the papers and documents required for the manifestation and protection of the ship and cargo, by the laws of the countries from and to which the ship is bound, and by the law of nations in general, and treaties between particular states. The rule of the French Ordinance on this subject is, that the master must have on board the charter-party, and other documents relating to the proof of his lading; (*Liv. 3. tit. 1. Charter-parties, art. 10. and Valin thereon; see also Pothier's Charter-parties; num. 81.*) Valin, in his *Commentary on the Ordinance*, says, that this article relates chiefly to a time of war; and that if a ship should be condemned as good prize, on account of the master's failure in this respect he must answer for the event.

† As to what outfit may be necessary for the voyage, it may be stated, that what is usual must be presumed to be necessary; at all events, proof that the ship was fitted as vessels in the merchant's service for such a voyage usually are, would be evidence that it had been provided with all that was necessary for the voyage in question; see 4 East. 154.

Though not even, it has been held on, certain of a cargo.
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This was an action of covenant upon a charter-party of affreightment by the merchant hiring the ship against the master, for not going to the loading port. The deed contained a proviso, that if the ship should not arrive at the port by a certain day, it should be at the plaintiff's option on the ship's arrival there, either to load the ship on the terms of the charter-party or not, or at the then current freight, or to refuse the ship entirely. It did not appear that the defendant covenanted to arrive at the port in question by any given day, but to proceed as soon as wind and weather would permit. The declaration assigned two breaches; first, that the ship did not sail and proceed to the port at all; and secondly, that it did not arrive there on the day, or at any time afterwards; but on the contrary, the defendant wilfully absented himself therefrom. The defendant pleaded that he sailed with all convenient speed, and proceeded to another port, but by reason of contrary winds and bad weather, he was prevented from proceeding to or arriving at the port in question by the appointed day, which pleas were held bad on general demurrer. *Lord Mansfield*, in giving judgment, observed, that the defendant had covenanted absolutely to go to the port in question, and the proviso, in order to quicken the ship's arrival there, stipulated, that if the ship arrived by the appointed day, she should be certain of a freight, and if not, that she should yet have the chance of one; the defendant, therefore, became an insurer of the risk of his getting there before that day. *Mr. Justice Wilmot* said, that if the defendant had not expressly covenanted to go to this port, and had been unavoidably prevented, without any default in himself, it might have been a different case; but the defendant having bound himself by an express covenant to go to that port, the proviso would not excuse him for not going there at all, because he could not get there so soon as that day.

(1 b) *As to altering such port when once fixed.*

WHITE v. PARKIN. T. T. 1810. K. B. 12 East. 578.

Which port may, be, that the ship should take in her lading in some port in the British channel; but they afterwards entered into a parol engagement that the ship (which was at that time lying in the Thames) should immediately commence her lading, and should pay hire to the ship-owner from the day of such commencement. The Court held, under these circumstances, that such parol agreement was binding, inasmuch as it did not contradict, nor was inconsistent with, the charter-party. *Lord Ellenborough* observed, that though parties could not dispense by parol with the performance of any of their covenants in a deed, there could still be no objection to an earlier inception of the service in this case, than that which was covenanted for under the deed; and said, that the parol agreement merely borrowed some of the terms of the charter-party by reference to it, but did not contradict or dispense with it.

The parties to this action had entered into an agreement, by charter-party, that the ship should take in her lading in some port in the British channel; but they afterwards entered into a parol engagement that the ship (which was at that time lying in the Thames) should immediately commence her lading, and should pay hire to the ship-owner from the day of such commencement. The Court held, under these circumstances, that such parol agreement was binding, inasmuch as it did not contradict, nor was inconsistent with, the charter-party. *Lord Ellenborough* observed, that though parties could not dispense by parol with the performance of any of their covenants in a deed, there could still be no objection to an earlier inception of the service in this case, than that which was covenanted for under the deed; and said, that the parol agreement merely borrowed some of the terms of the charter-party by reference to it, but did not contradict or dispense with it.

2. *As to loading the vessel.*

(1 a) *General rule.*

The master must then, as usually stipulated, receive the goods on board, with all convenient speed, &c.

The usual stipulation of charter-parties under this head is, that the master or owner shall with all convenient speed receive on board, load, and store, in a regular and proper manner, all such goods and merchandize as shall or may be sent by the said freighters "alongside the said ship or vessel in the said port of ———, not exceeding what the said ship or vessel can conveniently and safely carry over sea, besides her provisions, tackle, apparel, and appurtenances, the master's cabin and the usual necessary room for the ship's crew excepted." The duty and mode of loading by ship-owners and masters bear an exact analogy to the similar duty of land carriers, and the responsibility of these parties, it has been seen, is, in this respect, governed by the same prin-

* As a general rule, it may be stated, that the duties arising out of the covenants on the part of the master of a vessel, appertaining to the loading the vessel, are all comprehended under the general principle, that whatever he is bound to do, either by his contract or by the usage of trade, he is likewise bound to do in a sufficient and seaman-like manner; and if he omit, or neglect it, or do it ignorantly or unskilfully, he is liable in damages for the consequences of his negligence or ignorance.

ciples, and subject to the same extensions or qualifications, *ante*, p. 143. The ship must remain his lay or running days at the loading port, for the purpose of taking in her cargo; and if she be not loaded in that time, the master should make protest accordingly; otherwise, it is said, freight cannot be claimed by common law, or suit in the Admiral Court. In 1587 this matter was in question with five ships from Leghorn and Civita Vecchia to England, when the grand armada was preparing in Spain. They all of them came away without their lading. Two of the ships had remained the due time stipulated in the charter-party for taking in their lading, and the master had made notarial protests against the factors; these were, by the Admiralty law, adjudged to have earned their whole freight. Two other of these ships not having staid their proper lay days, nor made any protest, were found not to have earned any freight at all, although they were laden outwards. (Mal. 90.) The charter-party of the fifth of the above ships contained a proviso, that if, in her return from the straits, she should be taken or cast away, the outward freight should nevertheless be paid, which was therefore adjudged to the master, but no more, he not having remained the appointed time. And (says Malyne) if there had not been this proviso, he could not have recovered any thing.

(1 b) *As to loading a full and complete cargo.*

1. HUNTER v. FRY. E. T. 1819. K. B. 2. B. & A. 421.

By a charter-party a ship was described to be of the burden of 261 tons, and the freighter covenanted therein to load a full and complete cargo, not exceeding in the whole what the said ship could reasonably carry. The defendant, against whom, as freighter, an action was brought by the owner, loaded on board goods equal in number of tons to the tonnage described in the charter-party, which the plaintiff contended was not sufficient, as the vessel was capable of carrying with safety a larger quantity, and that he was entitled to recover damages for the difference between the freight carried for the goods actually shipped on board, and that which would have been carried if a full and complete cargo had been laden on board. The Court acquiescing in this view of the case, said: the stipulation in the charter-party is not that the owner should receive and the freighter put on board a cargo equivalent to the tonnage described in the charter-party, that the one should receive a full and complete cargo on board. Now it is clear that the freighter would be entitled to recover damages against the owner, if the latter had refused to receive on board any thing less than what the ship would carry with safety; and it therefore seems to us, that the plaintiff is entitled to recover the difference between the freight of the goods actually laden on board, and the freight of those which by the terms of his covenant he was bound to load on board.—Judgment for safety plaintiff.

2. RITCHIE v. ATKINSON. M. T. 1808. K. B. 10 East. 295.

The master and freighter of a vessel of 400 tons mutually agreed in writing, that the ship being every way fitted for the voyage, should, with all convenient speed, proceed to St. Petersburg, and there load from the freighter's factors, a complete cargo of hemp and iron, and proceed therewith to London and deliver the same on being paid freight, for hemp, 5*l.* per ton, for iron, 5*s.* per ton, &c.; one half to be paid on right delivery, the other at three months. The question now raised was, whether the master might recover freight for a short cargo, at the stipulated rates per ton. It was urged for defendant that the covenant to bring home a complete cargo, was a condition precedent to the plaintiff's right to recover freight upon the contract. *Sed per Cur.* The plaintiff is entitled to recover freight on the charter-party, in proportion to the cargo, although he did not take home a complete cargo. The delivery of a complete cargo cannot be viewed as a condition precedent; nor the payment stipulated for entire, but to be made at the rate of so much per ton on the different articles brought home and delivered, and therefore in its nature apportionable. The words, "and deliver the same" are equivocal, and may mean the cargo actually delivered, as well as the whole quantity stipulated for; and the former is the more reasonable construction, especially in a mercantile instrument, because

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Upon a covenant in a charter party to load a full and complete cargo, the Court held, that not withstanding the ship's burden was specified in the deed, the freighter was bound to put on board as many goods as the ship was capable of carrying with safety.

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But although a master of a vessel may agree that he will load a complete cargo and proceed and deliver the same on being paid freight, yet such a covenant is not a condition precedent to the freight.

the plaintiff would then be entitled to receive the just proportion of freight which he had earned; and if, through negligence, he did not bring home so complete a cargo as he might have done, the defendant would have a remedy against him upon the covenant. The true rule in these cases was laid down by Lord Mansfield in *Boone v. Eyre* (6 T. R. 573. and 1 H. Bl. 273. n.), that "where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions; but where the covenants go only to a part, and where a recompence may be had in damages, it is a different thing;" and this was recognized in *Campbell v. Jones* (6 T. R. 573.); and the Duke of St Albans v. Shore, (1 H. Bl. 278.) To construe the delivery of a complete cargo to be a condition precedent to the right to recover any freight, would be manifestly unjust, because, if it should appear by any subsequent admeasurement of the vessel, even after the delivery of the cargo, that there was wanting some small fraction of a complete cargo, if the ship had been supposed to measure 400 tons, and a cargo adapted to that proportion had been loaded, and it turned out that she measured 10 or 20 tons more, the owner would altogether be defeated of his remedy for the whole freight. As there will be, therefore, great injustice done by holding this to be a condition precedent, and none by a different construction, the *postea* must be delivered to the plaintiff. See 1 Lev. 16. and 1 Keb. 100; 7 T. R. 381; 2 Burr. 882. and 1 Bl. 190; 1 Rob. Ad. Rep. 289; 1 Brownl. 21. 24; 8 East. 437. 445; 6 T. R. 570; 8 T. R. 259; Abbott's Law of Merchant Ships, 280; Palm. 397; 1 Campb. 277; Doug. 689.

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Another part of the duty arising from the covenant to load the vessel, is so to load, stow, and arrange the different articles, of which the cargo consists, that they may not be injured by each other, or by the motion or leakage of the ship, or by any other means.*

(1 c) *As to the manner of loading, stowing, &c.*

SHEELS v. DAVIES. M. T. 1814. C. P. 4 Campb. N. P. C. 119.

This was an action of *assumpsit* for the freight of a cargo of butter, carried in a general ship, and received by the defendant under a bill of lading. It was offered as evidence in defence, that the butter had been injured by bad stowage, to a degree much beyond the amount of freight; and it was contended that this was a sufficient answer to the action, as it showed that no benefit had been derived from the carriage of the goods; and, at any rate, it might be given as evidence in mitigation of damages. It was admitted, that bad stowage was an injury for which the master was responsible; but it was decided that the freight had been earned, and that the damage by stowage must be made the subject of a cross action. See Wellwood, p. 29; Ordin. of Antwerp, 2; Magens, p. 16 art. 8; French Ordinance, liv. 2; Laws of Wisbuy, art. 23; Laws of Oleron, art. 11. and Cleirac thereon.

* The manner of taking the goods on board, in compliance with the covenant to load the vessel, and the commencement of the master's duty in this respect, depend upon the custom of the particular place; *vide ante*, p. 66. 142. It is in all cases the duty of the master to provide ropes, &c. proper for the reception of the goods into the ship; (Laws of Oleron, art. 10; Laws of Wisbuy, art. 22; Wellwood, tit. 9.) And if a cask be accidentally staved by letting it down into the ship's hold, the master must answer for the loss; (*Goff v. Clinkard*, 1 Wils. 282.)

The laws of Oleron and Wisbuy provide, that in the hoisting of wines, &c. the men do not fasten the ropes well at the ends of the pipes, &c. so that they slip and fall, and are lost, the master and mariners are bound to make them good to the merchants; but the merchants must pay the freight of the damaged or lost wines, because they are to be paid by the master and mariners what the rest of the wines shall be sold for. The owners of the ship are not by those laws to suffer; because the damage happened by default of the master and mariners; (Leg. Ol. 26; Leg. Wils. 28.) But in cases of chartered ships, the master or owners, or any other persons, who bind themselves by the charter-party, and such alone, are answerable for the breach of any of their covenants or agreements contained in it, whether it be under seal or not. In general, the freighter covenants to bring the goods alongside the vessel, and the master or owners to load and stow them properly on board, which of course, makes them answerable for any misconduct or negligence in the loading or stowage; see Laws on Charter-parties, p. 37. As soon as any goods are put on board the master must provide a sufficient number of persons to protect them, for even if the crew be overpowered by a superior force, and the goods taken while the ship is in a port or river within the body of a county, the master and owner will be answerable for the loss, although they have been guilty neither of fraud nor fault, the law, in this instance, holding them responsible, from reasons of public policy, and to prevent any combinations between thieves and robbers: *vide ante*, p. 143.

(1 d) *As to what goods the owner is bound, under a covenant to load the vessel, to receive on board.** And under this covenant the master is generally bound to receive on board all goods

It is in general the duty of the captain and owners to receive such goods as are brought to them; though if the charter-party be for the affreightment of particular goods, or the property of particular persons, the captains and owners can only be obliged to load such goods or property. More must not be taken on board than the ship can conveniently carry, leaving room for her own furniture, and the provisions of the crew, and for the proper trading of the vessel; see Roccus, vol. 30; Ordin. of Rotterdam, 2; Magens, p. 102. art. 127. [327] Neither may the master take on board any counterband goods, whereby the ship and other parts of the cargo may be liable to forfeiture and detention; see freighter, Molloy, book 2. ch. 2. sec. 7; Roccus, vol. 66; Wellwood, tit. 9. Where it was stipulated by a charter party, that the merchant should have the exclusive use of the ship outwards, and the *exclusive* privilege of the cabin, the master not being allowed to take any passengers, on the trial of an action against the owner for a breach of this stipulation, evidence was allowed to explain, that under a charter-party so worded, it was the constant usage of trade to allow the master to take out a few articles for private trade, and that this was, therefore, the implied understanding between the parties at the time of executing the charter-party; see Abbott, 4th edit. 222. note 2.

3d. *As to the covenants and consequent duties appertaining to the commencement and performance of the voyage.* barden†

1. *As to the covenant to sail.*

(1 a) *From the port of delivery.*

(2 a) *In general.†*

Every precaution being taken in the performance of the owners' covenants and consequent duties, previous to the commencement of the voyage, the master must forthwith obtain the necessary clearances or permission to sail from the officer of the customs, or others appointed for the discharge of vessels, and pay the necessary port and other charges for that purpose, and commence his voyage [328]

* It has been already seen, *ante*, p. 148. that to charge the owner or master, &c. the delivery must be to an officer, or other person accredited on board the ship, and not to the crew at random. What delivery is sufficient is, however, in general, a question depending on usage, and to be tried by a jury. The master must, according to the terms of the charter party, commence the

† It is said by Malyne, in his chapter on Affreightment by Charter-party, that if the master take on board more lading than the acknowledged burden of the ship, especially if it consist of other persons' goods than the freighter's, he loses his whole freight, for by this he may endanger the merchant's goods which he has contracted to carry; and in such case, if any part of these goods are cast overboard in a storm, the loss shall not be made up by contribution or average of the merchants, but by the master's own purse; Mal. 99. Malyne also further lays it down, that if any man compel the master, to overburden the ship or boat, he may be accused criminally, besides being compelled to pay the damages happening thereto; *ib.* Nearly to the same effect Beawes observes, that if the master lets out the ship, and afterwards secretly takes in other goods unknown to the first freighter, by the law *maritime* he loses his freight; and if it so happen that any of the freighter's goods, for safety of the ship, be cast overboard, the rest shall not become subject to the average, but the master must make the damage good; though (according to Beawes) if the goods be brought into the ship secretly, and unknown to him, it is otherwise; Beawes, 187. The observations of both these writers seem to be founded on one of the laws of Wisbuy, which provides, that the ship being laden, the master must not take any more goods without the merchant's leave, and if he fails therein, in case there be casting of the goods overboard, he shall be a loser by so much more commodities as he has taken on board over and above what he ought. Therefore, upon the lading of the ship he ought to declare his intention to take such and such goods; Leg. Wis. 46. But though this seems to be the universal law on the subject, the rule of the common law, in the absence of any express provision in the charter-party on the subject, in analogy to other cases, seems to be this, that if the master overloads the ship by putting on board more than she can reasonably stow and carry, over and above her tackle, &c., by which a damage happens to the freighter, his so doing would be a breach of the *implied* covenant in the charter-party not to do so, by the words "that he will load and stow all such goods as shall be sent alongside, not exceeding what the ship can reasonably stow and carry, &c." See Lawes on Charter-parties, p. 37. 88. and 89.

‡ If a time be fixed, between the merchant and the master, when the voyage is to be begun and finished, it cannot be altered by the supercargo, without special authority for that purpose; Mol. book 2. c. 4. s. 6. This authority ought, it seems, to come from the

voyagewith age without delay as soon as the weather is favourable. (Guidon. ch. 5. art. 33; Molloy, Book 2. ch. 2. sec. 9; Ordin. of Rotterdam. 2; Magens, p. 102. all convenient speed, art. 128.) But he must on no account sail out during tempestuous weather.* (Molloy, book 2. ch. 2. s. 4; Roccus, not. 56.) This obligation is usually expressed in charter-parties by the words, "that the vessel shall, with all convenient speed, sail and proceed to such a port, or as near thereto as she may safely get." When by the terms of a charter-party, a number of days is appointed for the lading of the cargo, either generally and without payment on that particular account by the merchant; or by way of demurrage; the master must not sail before the expiration of the time. Upon the conclusion of this time he must sail from port with the first favourable wind; and thence proceed to the place of destination without delay. Where, however, the above form is adopted, it becomes a question for the jury to decide if any doubt arise respecting it in an action on the charter-party, whether he did or did not sail within a reasonable and convenient time; which may depend on many circumstances, as the state of the vessel, or of the wind and weather; or whether any embargo in port, or enemies at sea, or the like, may or may not have rendered it proper, possible, or expedient, for him to have set sail.

(2 b) *With the first fair wind.*

1. CONSTABLE V. CLOBERIE. Palmer. 397.

The owner or master of a vessel, covenanted in this case, that his ship should sail with the first wind on a voyage to Cadiz; and the merchant covenanted, that if the ship should go on the intended voyage and return to the Downs, he would pay a certain sum. To recover this sum an action was brought. The merchant pleaded in his defence, that the ship did not sail with the next wind; which fact was admitted by the plaintiff. But the Court held that the substance of the covenant, and primary intention of the parties, were, that the ship should perform the voyage; and not that the ship should sail with the next wind, which changes every hour; and that the merchant must pay the money.

2. BORNEMANN V. TOOKER. E. T. 1808. K. B. 1 Campb. 377.

By a charter-party between the plaintiff, the captain of a ship, and the defendant's agent abroad, for the carriage of timber from Riga to Portsmouth, at a stipulated rate per load, the former bound himself, after receiving his cargo on board, to sail with the first favourable wind direct to the port of Portsmouth. The ship, however, unnecessarily entered the harbour of Copenhagen, where she was detained several weeks, by means whereof the defendant was put to considerable expense in having fresh insurances done upon the freighter of the ship, or his correspondents or agents, as he is the only person who can complain of the time originally fixed not being observed. The time of sailing is not such a material circumstance as that the alteration of it amounts to an abandonment of the other terms of the charter-party, especially if it be under seal. This case differs completely from those where the time limited for the performance of a contract by deed is material and insurable, and a parole licence is not allowed to dispense with the original stipulations, and all remedy upon the original contract being lost, the party is obliged to resort to his remedy upon the new agreement for the enlargement of time; see 3 T. R. 590. 592; and Lawes on Charter-parties, p. 49.

* "By most of the ancient marine ordinances the master is required, before he hoists sail, to consult his mate, pilot, and others of the crew, as to the wind and weather; Wellwood, tit. 8. p. 26; Ordin. of Antwerp, 2; Magens, p. 17. art. 11; Emerigon. tom. 1. p. 376. But I apprehend such consultation is not required by the law of England, according to which the entire management of the ship is entrusted to the master; see Abbott on Shipping, p. 237.

† But although it appears by this case that the owner will not absolutely lose his freight by a delay in the commencement of the voyage, if the voyage be afterwards performed; yet if the merchant sustains any injury by such delay, he will be entitled to a compensation in damages proportioned to his loss; Note on the Guidon, cap. 7. sect. 10. p. 240. Supposing the covenant had been, that if the plaintiff would sail with the next fair wind, then the defendant will pay the freight; there the circumstances of her so sailing might, by the word *if*, be made a condition precedent to the plaintiff's right to freight, and become a substantial part of the contract; so that in an action on the charter-party for the freight, the plaintiff must aver and prove that he sailed with the first wind, the allegation being traversable in the first case above supposed, though alledged; see Lawes on Charter-parties, p. 43; Dequ. 272; Palm. 397.

cargo. This was an action of *indebitatus assumpsit* for the freight. It was contended for the defendant, that the plaintiff's sailing with the first favourable wind direct to Portsmouth, was a condition precedent to the recovery of freight, and that the damage suffered by the defendant might at any rate, be given in evidence in reduction of damages. But Lord Ellenborough said, that to hold that any short delay in setting sail, or trifling departure from the direct course of the voyage, would entirely destroy the plaintiff's right to be remunerated for transporting the cargo, would indeed be going *inter apices facti*, and that the defendant must bring his cross action for any loss he might have suffered from the default of the plaintiff.

3. COLE V. SHALLETT. H. T. 1681. C. P. 3 Lev. 41.

This was an action for freight upon a charter-party, whereby the master of a ship covenanted to sail with the first fair wind to Barcelona, and return with the first fair wind to London. The defendant pleaded, that the ship did not directly return to London, but went to Alicant, Tangiers, and other places, whereby the goods were spoiled; but, on demurrer judgment was given for the plaintiff, because the covenants were mutual and reciprocal, whereupon each party might have his action against the other, and not conditions precedent, so as to be pleaded in bar; for perhaps the damage sustained by the different parties might be irregular.

And no evil is thereby wrought, as the freighter is always left to his cross action.

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(2c) On or before a certain period.*

1. UNWIN V. WOLSELEY. E. T. 1787. K. B. 1 T. R. 674.

In an action of covenant the declaration set forth a charter-party, which contained an agreement on the part of the defendant to employ a certain ship, for the captors of which the plaintiff was agent as soon as sentence of condemnation should have passed upon her on certain terms as to freight. It then stated that before the making of the charter-party a certain suit or proceeding had been instituted in Saint Helena, (the place to which the ship had been carried immediately after her capture) on behalf of the captors, before certain commissioners appointed according to the royal charters under the great seal, confirmed by several acts of parliament, for the purpose of distributing justice in all maritime cases whatsoever, concerning ships which might be brought, or persons who might come, within the jurisdiction of the powers delegated for the government of the island of Saint Helena, for the purpose of obtaining the sentence of condemnation by the said commissioners of the said ship, which said suit was depending at the time of the making of the said charter-party.—That after the making of the said charter-party, sentence of condemnation was

A covenant in a charter party that the ship should sail as soon as sentence of condemnation was passed up on her, was held to mean a sentence passed by a court of competent jurisdiction

* If a ship be not ready on the appointed day, and the charterer has derived no benefit from the charter-party, he may rescind it *in toto*, and procure another ship for the conveyance of his goods; and if he has shipped part of his goods, he may ship the remainder of them on board another ship, and recover damages against the owner; see Cro. Car. 383; 3 Lev. 288; 1 Beaves, 188; Mal. 98; Moll. book 2. c. 4. s. 3; Com. Dig. tit. Merchant, E. 7; Abbott, 198. Molloy says, that if the master put to sea after the time fixed for his departure, and any damage then happens, he is answerable for the consequences; Mol. b. 2. c. 2. s. 6. It seems, that although it may be physically impossible to get out of the port from the state of the wind, yet this or the like unavoidable circumstances will not protect the master from an action on his express contract, unless there be the usual exceptions in the charter-party. Such exceptions would, undoubtedly, have that effect; and if, by any accident or inadvertence they be omitted, it cannot be worth while to sue for the breach of a covenant, whereon no more than nominal damages can be expected, which is generally the case with the covenant in question, unless gross negligence or misconduct be the cause of it, which seldom happens. By the laws of Oleron and Wisbuy, when a seaman falls sick in the ship, the master ought to send him on shore, and if the ship be ready for her departure, he ought not to stay for the sick party; Leg. Ol. 7. This is very good advice, equally applicable to the case of a general ship, and a contract of affreightment by a charter-party; it being, as has just been said, a general rule that if there be a covenant or agreement in the charter-party to sail on or before a certain day, or with the first fair wind, or with the first convoy, or the like, and there is no alteration of this part of the contract by competent authority, although the non-performance of it will not, in general, furnish a defence to an action for the freight, yet it will subject the master, or his owners, (according as the contract may be framed) to an action for any damages which may, in fact, be sustained in consequence of the breach of the charter-party, unless there be some sufficient excuse for the non-performance.

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placed in the said suit, upon the said ship, by the said commissioners, whereof the defendant had notice, with an averment, that the said sentence of condemnation was the same as that mentioned and referred to by the said charter-party. It then stated that the ship had been employed by the defendant; and the breach was for non-payment of freight. There was a demurrer in the declaration, and it was shown for cause, that it did not appear that the ship before or at the time of making of the charter-party, or afterwards during the said employ, ever had been, or was legally in due form of law, condemned or finally adjudged lawful prize in any of his majesty's courts of Admiralty in Great-Britain, or in his majesty's plantations in America, or elsewhere, or in any other court, having competent jurisdiction to condemn, or finally adjudge, the said ship lawful prize to his majesty; and also for that it did not appear how, or by what lawful means, the said ship had become, or was, the property of the plaintiff or the captors; and that it did not appear that the said commissioners, before whom the said suit for the purpose of obtaining the sentence of condemnation upon the said ship, was supposed to have been depending at the time of the making of the said charter-party, had any lawful or competent jurisdiction, power, or authority, to condemn or finally adjudge the said ship lawful prize, according to the form of the statute, &c. The court were of opinion that the words; as soon as sentence of condemnation should have passed, must be taken to mean a legal condemnation, and though it was stated in the declaration that the sentence of condemnation which was passed was that referred to in the charter-party, yet that being a matter of law, could not be supplied by an averment that it referred to the sentence of condemnation at St. Helena. As this sentence of condemnation was passed by a court of the ordinary course of law, and not authorised by any public act of parliament, the plaintiff should have shown that it was given by a court having competent jurisdiction. A legal condemnation was a condition precedent, which ought to have been made by the party claiming the benefit of it.

2. HALL V. CAZENOVE. H. T. 1804. K. B. 4 East. 477. S. P. SHOWER. V. CUDMORE. T. JONES. 216.

But it would appear that had such covenant not been pleaded in bar to an action by the plaintiff for freight.

Action of covenant on a charter-party, which *inter alia*, contained a covenant by the owner that the said ship, so by the said deed let to the defendant, should and would proceed on his intended voyage on or before a certain day previously mentioned, (which, however, was an impossible day; as when the deed was delivered, the time itself had gone by, *vide ante*, p. 305.) in consideration of which, &c. the defendant covenanted and agreed that he would pay a certain freight for the voyage. The declaration averred a performance of the voyage; and that the freight was earned; but did not allege that the ship sailed on or before the day above mentioned. The court seemed divided as to their opinion of whether the stipulation ought to have been viewed as a condition precedent to the successful maintenance of this action; had it been possible to have been performed at the time of the delivery; but although Lord Ellenborough C. J. and Grose. J. seemed to view it as a condition precedent; Lawrence and Le Blanc, J. observed, that if the defendant sustained any damage by reason of the ship's not having sailed on the particular day, he might recover it by bringing his action on the covenant, but at any rate that the objection did not go to the plaintiff's right of action, as on the ground of a condition precedent.—See East. 41.

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If there is a clause inserted in the charter party to sail with con

(2d) *With convoy**

SNELL V. MARRYAT. Abbott on Shipping. 644.

This was an action brought by a person who had shipped goods on board a general ship for Grenada, against the owner, for having sailed without convoy, in consequence of which he had lost the benefit of an insurance, which he had

* The consequence of the master not sailing with convoy according to covenant, may be his liability to an action for any damages happening to the cargo, though occasioned by the accident excepted in the charter-party, from which he would have been exempt if he had pursued the directions contained in it; for the exception is only meant to protect him from such accidents, in case of pursuing those directions, And if in confidence of the mas-

affected, the ship having been captured on the voyage. The ship had been voy, the put up or advertised "to sail with convoy." The bill of lading made no men- vessel must tion of convoy. It was, in fact intended that the ship should sail with convoy, repair to but she was blown out of the Downs in a gale of wind, and the master then intended to go to Falmouth, to wait for a convoy; but being prevented from do- the place of rendezvous ing so by the appearance of a French privateer; by which he was chased, he pose. made sail for Grenada, and was afterwards taken. At the trial the defendant obtained a verdict. The court was afterwards moved to grant a new trial; and the case was argued at some length. A new trial was granted, in order that the court might receive further information; and the attention of the counsel was directed to the following points: whether the concise expression, "to sail with convoy," meant any thing more than that the ship was intended to sail with convoy, or could be construed as a warranty that the ship should sail with convoy, and of the circumstances by which he had been prevented from doing so. The cause was not taken down for a second trial.

2. THOMPSON v. INGLIS. T. T. 1813. N. P. 3 Camp. 428.

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It was covenanted on the part of the defendant, that he would load on board And if the the plaintiff's vessel lying at Tobago, a full cargo of the produce of that island, master ne and dispatch her, so loaded, for London, in time to enable her to join the con- glect to voy, which should be appointed to sail from the West Indies to England, on the proceed with the 1st of August. It appeared that the vessel was ready to receive a cargo he will be the 14th of July, and that she might have been loaded by the 22d of that liable for all month, when the convoy left the island. The captain refused to stay longer losses aris than the 22d of July, though an offer was made to load the ship completely in ing from the a few days. In an action for dead freight, it was holden, that as the defendant want of con voy was bound to have completed the lading by the day when the general convoy from those islands passed the ship's station, and as it was shown that sufficient time had elapsed for that purpose, the defendant had broken the covenant.— Verdict for the plaintiff.

3. HIBBERT v. PIGOU. E. T. 1783. K. B. Park on Insurance, p. 443.

This case came before the court upon a rule to show cause why the verdict, Theconvoy which the defendant had obtained, should not be set aside, and a new trial must be a had. It was an action upon a policy of insurance on the ship Arundel, Capt. ship or Mann, at and from Jamaica to London, warranted to depart with convoy. The ships ofwar insurance was at 18l 18s. per cent. to return 3 per cent. if the ship sailed on by the go or before the 1st of August. The facts appearing on the report of Lord vernment, Mansfield, who tried the cause, are these: On the 25th of July, the Arundel or their sailed from Morant harbour to Kingston, where she met the Glorieux man of agent, as war, Captain Cadogan, who was likewise on his way to join Admiral Graves, the protec at Bluefields. Lord Rodney had appointed Admiral Graves to rendezvous at tion of the Bluefields, in order to take the fleet of merchants' ships which were to sail ship ofwar from thence on the 1st of August, under his command, and to convoy them to accidental ly bound on Great Britain. Captain Mann, upon their meeting in Kingston harbour, asked the same voyager, for sailing orders from Captain Cadogan, who said he had none, not having though dis ter's covenant, the freighter's effects are insured, with a warranty or stipulation that the chargingthe ship shall sail with convoy, it seems that he may sue the master for that indemnity which office of a by his misconduct or neglect he cannot obtain of the underwriters; Abbott, 288. Nothing a convoy, is less than a warranty or covenant, &c. to sail with convoy will charge the captain or ship- not a con owner; though such warranty, may, perhaps, be implied from circumstances. It has been voy within made a question, whether the mere expression in the advertisement of a general ship, "to the mean sail with convoy" means any thing more than that the ship is intended to sail with con- ing of a co voy, or can be construed as a warranty that the ship shall so sail, where the bills of lading covenant to make no mention of convoy; Snell v. Marryatt, Abbott, Addend. 644-5, et supra. The sail with necessity of sailing under convoy does not at all times depend merely upon a special under- one. taking or warranty for that purpose, during war, it has been thought expedient by the legislature of different states, to compel merchant vessels, in many cases, to place themselves under this protection, as a measure of public policy, to prevent the enemy from enriching himself by their capture. The construction that has been put upon an undertaking to sail with convoy, will in general be found to be the true construction of these acts of parliament. And see 1 Taunt. 249; 3 Taunt. 181; Abbott, 246; 1 B. & P. 5; 2 id. 184; post, tit. Ship and Shipping; et vide Valin's Commentary on the French Ordinance, tom. 1. p. 691; Magens, 214.

himself at that time joined the Admiral; but he was sure that Admiral Graves would not sail from Bluefields till the Glorieux joined him. However, if he should have sailed, he, Captain Cadogan, would give Captain Mann sailing orders, and take every care of the Arundel in his power. They proceeded together, and arrived at Bluefields on the 28th of July, but they found that Admiral Graves had sailed two days before. The Glorieux and Arundel then sailed from Bluefields, the former firing guns, giving signals, and behaving in every respect like a convoy. Upon the 1st of August, a signal was made that the fleet was in sight; and on the 7th, they joined the fleet off Cape Antonio. The Arundel was afterwards lost in September, in a dreadful storm, which dispersed the whole fleet, and in which a vast number of ships perished. Upon this evidence the jury were of opinion, under the direction of the Chief Justice, that the terms of the warranty had not been performed, and they, therefore, found a verdict for the underwriters, the defendants. After this question had

[234] been fully argued at the bar, the following judgment was delivered; in deciding this case, it is not necessary to say, whether sailing orders are essential or not; as at present advised, we do not say that they are absolutely necessary. The present question is simply this: did the Arundel sail with convoy. This is a condition which must be literally complied with, as all the cases agree. As to the question itself, it is undoubtedly a question of fact: and the facts of the case seem to us to prove, that the Glorieux was no part of the convoy. Admiral Graves had sailed before they arrived; and that circumstance seems very material, that no orders were left behind for the Glorieux. We say that on this evidence, she was not a part of the convoy; for in order to make her so, it must appear that she was under the orders of Graves. Did he leave her behind to take care of the ships that remained? if so, it would alter the case very materially. But there was no such idea; for if there had, the Glorieux would have remained at Bluefields for the rest of the ships, until the 1st of August; on the contrary, Captain Cadogan, finding that Admiral Graves was gone, immediately followed; for his sole object was to join Admiral Graves. Ships must sail under the convoy appointed by the government, who proportion the strength of it to the necessity of the times. To what end would this care be taken, if merchantmen were to sail under the protection of single ships with which they may happen to meet? We are, therefore, of opinion, that if a ship do not sail with the convoy appointed by government, it is not a sailing with convoy within the terms of the policy. The rule for a new trial was therefore discharged.

This covenant to sail or depart with convoy does not mean that the vessel shall depart with convoy immediately from the landing port, but only from the place of rendezvous appointed for vessels bound for that port. therefore if the lading port be London, and the place of rendezvous the Downs,

4. LETHULIER'S CASE. M. T. 1691. K. B. 2 Salk. 443; 3 Lev. 320

This was an action on a policy of insurance by the defendant at London insuring a ship from thence to the East Indies, warranted to depart with convoy. It appeared that the ship went from London to the Downs, and from thence with convoy, and was lost. After a frivolous plea and demurer, the case stood upon the declaration; to which it was objected, that there was a departure without convoy.

Et per Cur. The clause "warranted to depart with convoy," must be construed according to the usage among merchants, that is, from such place where convoys are to be had, as the Downs, &c. Holt, C. J. *contra*. We take notice of the laws of merchants that are general, not of those that are particular usages. It is no part of the law of merchants to take convoy in the Downs.

5. GORDON V. MODLEY. H. T. 1746. K. B. 2 Str. 1265.

On an insurance from London to Gibraltar, warranted to depart with convoy, it appeared there was a convoy appointed for that trade at Spithead, and the ship *Ranger* having tried for convoy in the Downs, proceeded for Spithead, and was taken in her way thither. The insurers insisted that this being the time of a French war, the ship should not have ventured through the channel, but have waited in the Downs for an occasional convoy. And many merchants and office-keepers were examined to that purpose. But the Chief Justice held that the ship was to be considered as under the defendant's insurance to a place of general rendezvous, according to the interpretations of the

OrSpithead it is sufficient if the vessel sail with convoy from thence.

words, "warranted to depart with convoy;" Salk. 443. 445. And if the parties meant to vary the insurance from what is commonly understood, they should have particularized her departure with convoy from the Downs.

6. D'EGUINO v. BEWICKE. M. T. 1745. C. P. 2 H. Bl. 551.

A policy had been effected on goods on board a ship, called the Little Betsey, on a voyage at and from London to St. Sabastian in Spain, warranted to depart with convoy for the voyage; and at the trial of an action brought against the underwriters, it appeared that no convoy was appointed directly to St. Sabastian, but that the Little Betsey sailed under convoy of a squadron of frigates, the commander of which had orders from the Admiralty to take with him the Weazle and another frigate, and proceed to Gibraltar, and to take with him such ships as should be at Spithead bound to Bilboa (which is very near and in the course of St. Sabastian), and to dispatch the Weazle with the latter with orders to see them safe to Bilboa; and on the voyage the commodore made a signal for the Weazle to part company, and take with her such ships as were bound to Bilboa and St. Sabastian, in obedience to which the Weazle parted convoy and took with her the Little Betsey, and other ships bound to Bilboa and St. Sabastian, but soon after parted with them in chace of a strange ship, and did not afterwards join them. A jury of merchants, to whom Chief Justice Eyre left the question, determined this to be a sailing with convoy according to the meaning of the warranty; and the Court of Common Pleas afterwards approved of the verdict.

7. SMITH v. READSHAW. E. T. 1781. K. B. Park on Insurance, 454. S. P. DEXTER

GARAY v. CLAGGET. M. T. 1795. K. B. Ibid.

In this case it appeared that there had been an insurance on the ship William, "at and from London to Jamaica," warranted to depart with convoy for the voyage, Lord Mansfield, in the course of his summing up to the jury, said: a warranty to sail with convoy, means, with such a convoy as government pleases to appoint; and whether it consists of separate ships, at different stations or not, it is convoy for the voyage; therefore, on that point there is no doubt.

8. AUDLEY v. DUFF. H. T. 1809. K. B. 2 B. & P. 111. S. P. MANNING v. GIST. Marshall. book 1. c. 8. s. 4.

It appeared in this case, that a policy had been executed on a ship called the Ceres, "at and from Oporto to Lynn, with liberty to touch at any ports on the coast of Portugal, to join convoy particularly at Lisbon, at 12 guineas per cent., to return 6l. if she sail with convoy from the coast of Portugal, and arrive." The Ceres sailed from Oporto with a sloop and cutter appointed to protect the trade of that place to Lisbon, from whence it was to proceed with the Lisbon trade, under a larger convoy, for England. In the way from Oporto to Lisbon the fleet was dispersed by a storm, and the Ceres, judging for the best, run for England, and arrived. The Court held, that the assured was entitled to a return of premium.

9. LILLY v. EWER. H. T. 1779. K. B. 1 Doug. 72. JEFFERYES v. LEGER-DRA. 1 Show. 320; 4 Mod. 58; Carth. 216; Salk. 443; Holt. 465.

This was an action for money had and received, brought against an underwriter for a return of premium. The policy was on the ship the Parker galley, "at and from Venice to the Currant Islands, and at and from thence to London, at a premium of 5 guineas per cent., to return 2l. per cent. if the ship sailed with convoy from Gibraltar, and arrived." The ship touched at Gibraltar on her way home, and sailed from thence under convoy of Zephyr sloop of war, but the convoy was destined only to go to a certain latitude, about as far as Cape Finisterre, being ordered on the Lisbon station; and accordingly the ship and convoy separated, and the ship arrived safe at London. The only question in the cause was, whether, by the terms of the policy, the condition for the return of premium was a departure from Gibraltar, with such convoy as could be met with, for whatever part of the voyage that might happen to be, or, a departure with convoy for the voyage. At the trial a verdict was found for the plaintiff. In this term a rule was obtained to shew cause why there

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Neither does it require the vessel to sail with convoy to the place of destination, but only so far as the convoy appointed for that destination goes.

So if the ship sail under a force appointed to accompany the fleet for a part of the voyage only, and is then to be succeeded by another force.

Or she sail under the protection of a small force detached from the main body, to bring the fleet up to a particular point, this is sufficient.

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But the vessel must continue with the same convoy during the voyage.

should not be a new trial. and the case now came on to be argued, when, upon Lord Mansfield's report of the evidence it appeared, that the plaintiffs had called witnesses one of whom was an eminent merchant, who swore, that for some few years past, when convoys for the voyage, or the whole voyage, was intended, those explanatory words had been added, and that, by this usage, the expression of "sailing with convoy," and "sailing with convoy for the voyage," had received distinct technical meanings: "with convoy" signifying whatever convoy the ship should depart with, whether for a greater or less part of the voyage. Several policies were also produced, which had been filled up at the office of the same broker who had procured that which had given occasion to this cause, in which the words "for the voyage," or "for England," were added. The captain proved, that at the time when he left Gibraltar no other convoy was to be had. The witnesses for the defendant swore, that they understood the words "with convoy" to mean convoy for the voyage; and the broker said, that at the time when this policy was signed, he understood, and apprehended that it was so understood, by all the parties, that the convoy was to be for the voyage, and that the return was such as was usual when convoy for the voyage was meant. His lordship, after stating the evidence, said, that when the case was opened, he thought, on the face of the policy, that the words must mean for the voyage. He had not admitted the evidence to ask the opinion of the witnesses on the construction, but to learn whether there was any usage, in this case, which would give a fixed technical sense to the words. This was a question of fact, to be ascertained by evidence, and proper for the consideration of a jury. After argument, the Court said: on the words we were strongly of opinion that the policy meant a departure with convoy intended for the voyage. The parties could not mean a departure with convoy which might be designed to separate from the ship in a day or two, though, when convoy for the whole of a voyage is clearly intended, an unforeseen separation is an accident to which the underwriter is liable; for the meaning of such a warranty is not that the ship and convoy must continue and arrive together. But we still think, that the evidence was properly admitted at the trial of this cause, because the sense contended for by the plaintiffs was not inconsistent with the words of the policy, and therefore it was material to see what the usage was. The rule must be made absolute.

10. JEFFERIES V. LECENDRA. 1 Show. 320; 4 Mod. 58; Carth. 216; 3 Lev. 320; Salk. 443; Holt. 465.

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Unless it be prevented by unavoidable accident; but if such accident happen, and the master does every thing in his power to continue under the protection of the convoy, he will be excused at all events, if there should be the usual exception in the charter party.

Declaration in case, upon a policy of insurance on a ship called the Olive Branch, from London to Naples; and sets forth the policy in *hæc verba*, by which the ship was warranted to depart with convoy, and avers, that being laden, she departed from London towards Naples, *cum et sub presidio navis guerrinæ*; that afterwards she was taken at sea, and lost. *Non assumpti* plea ded. The jury found that the defendant signed the policy *pro*; that the ship departed with convoy; that the ship was separated from the convoy by stress of weather in the Downs; that she was driven into Foy; that she (waiting for convoy) did afterwards go out, expecting to meet the convoy, supposed to be coming from Torbay; that the wind was fair; that the convoy was not come up; that she could not return; that she sailed on; and that afterwards, ten leagues off, she was taken by a French man of war. The Court held, that this separation being by a tempest at the first, and the ship and convoy never after meeting, and the ship sailing to meet with the convoy to go with it the rest of the voyage, and being again driven away by tempest, and taken by pirates, though the convoy remained all this time at Torbay, was not such a neglect in the captain as to discharge the insurer.

See 2 Rol. Abr. 248; Skin. 3; 2 Vern. 176; Str. 1250. 1265; Ld. Raym. 732. 840; 8 Mod. 66. 230; 10 id. 77. 287; 3 Bac. Abr. 600; 1 Burr. 347; 3 id. 1237; Comp. 601; Park on Insurance, 347. 349; Doug. 732. 17. 22.

11. LAING V. GLOVER. T. T. 1813. C. P. 5 Taunt. 49.

The question in this case arose on the construction to be put on the Convoy Act, 13 Geo. 3. c. 57; the 1st section of which, after reciting the advantage

In which case the ow

arising from vessels sailing with convoy, enacts, that it shall not be lawful for any ship or vessel belonging to any of his majesty's subjects (with certain exceptions,) to sail or depart from any port or place whatever, unless under the convoy of such vessel or vessels as may be appointed for that purpose. The 4th section of the same act renders null and void all policies of insurance effected on ships which shall sail or depart without convoy, or shall afterwards desert, or wilfully separate, from such convoy, contrary, &c. It appeared, that the ship in question had sailed from Cork with convoy, and returned, and again sailed thence with the convoy; but that, in consequence of an accident, she was obliged to leave the convoy, and put back for the purpose of being repaired, and ultimately sailed on the original voyage without convoy, and without a licence for that purpose. The port of Cork is the general rendezvous of vessels desirous of obtaining a convoy; and, in fact, a convoy sailed six weeks after the departure of this vessel. The ship was lost by perils of the seas. The plaintiff had a verdict, subject to the opinion of the Court. On a rule for that purpose, the Court were of opinion, that as a vessel may sail, without convoy, from a port whither she is driven, from which no convoy is accustomed to sail, and as, from the nature of the goods on board, or from the expense and inconvenience incurred to the owner by the delay, the necessity of sailing might be fully as strong where a vessel, under the above circumstances, is obliged to sail either without convoy, or to wait a considerable time; and, further, as from the general nature of the language of the statute, and the natural supposition, that a case like the present was not unforeseen by the legislature, it is reasonable to suppose that the act was intended to apply only to the original sailing, coupled with the inevitable return of the ship to port; they were authorized, in considering it a case not prohibited by the legislature.—Rule discharged.

12. WEBB v. THOMSON. E. T. 1797. C. P. 1 B. & P. 5. S. P. ANDERSON v. PITCHER. 2 B. & P. 164. COHEN v. HINCKLEY. 1 Taunt. 249.

Per Heath, J. In deciding the point, that sailing orders are necessary to the performance of a warranty to depart with convoy, unless particular circumstances except the insured from the general rule; *Buller J. (absente Eyre C. J.,)* with whom the other judges present concurred, said: the case is here brought to a question of law. In point of law, then, the general proposition is, that sailing instructions are necessary. Now, we do not say that there may not be cases in which they may be dispensed with. In *Hibbert v. Pigou*, *Commo Park*, 341. it is said: it is not necessary to say whether sailing orders are essential or not; as at present advised, we do not say that they are absolutely necessary; and the case of *Victorin v. Clevee*, 2 Sta. 1250. goes no further. If the captain, from any misfortune, from stress of weather, or other circumstances, be absolutely prevented from obtaining his instructions, still it is a departure with convoy; but then he must take the earliest opportunity to obtain them. Generally speaking, unless sailing instructions are obtained, the warranty is not complied with; the captain cannot answer signals; he does not know the place of rendezvous in case of a storm; he does not, in effect, put himself under the protection of the convoy, and therefore the underwriters are not benefited.

13. VICTORIN v. CLEEVE. H. T. 1747. K. B. 3 Sh. 1250. S. P. MAGALHAENS v. BUSER. T. T. 1814. C. P. 4 Campb. N. P. C. 54.

The plaintiff insured on goods in the *John and Jane*, from Gottenburgh to London, with a warranty to depart with convoy from Fleckery. In July, 1744, the ship sailed from Gottenburgh to Fleckery, and there she waited for the convoy two months. On the 21st of September, at nine in the morning, three men of war, who had 100 merchants' ships in convoy, stood off Fleckery, and made a signal for the ships there to come out, and likewise sent in a yaul to order them out. There were 14 ships waiting, and the *John and Jane* got out by 12 o'clock, and one of the first; the convoy having sailed gently on,

* If the proper instructions be not obtained, and there is no excuse for not obtaining them, it is the same as if the ship had sailed altogether without convoy.

voidable accident; and being two leagues a-head. It was a hard gale, and by six in the afternoon the ship came up with the fleet, but could not get to either of the men of war for sailing orders, on account of the gale of wind. It was stormy all night, and at day-break the ship in question was in the midst of the fleet, but the weather was so bad, that no boat could be sent for sailing orders. A French privateer had sailed amongst them all night; and on the 22d, it being foggy, attacked the John and Jane about two, who kept a running fight till dark, which was renewed next morning, when she was taken. For the defendant it was insisted, that this ship was never under convoy, nor is ever so considered till they have received sailing orders; and if the weather would not permit the captain to get them, he should have gone back. But the Chief Justice and jury were both of opinion, that as the captain had done every thing in his power, it was a departing with convoy; and these agreements are never confined to the precise words; as in the case of departing with convoy from London, when the place of rendezvous is Spithead, a loss in going thither is within the policy. So the plaintiff recovered.

Excepted in the charter-party

14. SANDERSON v. BUSH. E. T. 1814. C. P. 4 Campb. N. P. C. 54. n.

In this case it appeared that there had been an undertaking to sail with convoy, but that the vessel had been prevented from joining it by the state of the weather. This was an action against the defendant as owner, for breach of his undertaking. It was contended, that under the circumstance above stated, the defendant was not liable, as the ship has been prevented from joining convoy by the accidents of navigation, which must be taken to be an exception to the whole of his undertaking. But *Gibbs, C. J.* said: the state of the weather cannot be viewed as an excuse for the non-performance of the contract.

Or if the commodore refuse them, he will not be liable for not having obtained them.

15. VERDON v. WILMOT. T. T. 1744. C. P. 2 Park, 444. notes; Abbott on Shipping, 243.

A ship insured, departed from London, and arrived at the downs, 22d of August, when a convoy were under sail, and the captain sent one of his men on board for sailing orders, which were refused, but the commodore said, "keep on, and I will take care of you;" and the ship being lost that night by sinking on the shore, the question was, if the ship was put under convoy, having no sailing orders? And it was held she was; and the plaintiff had a verdict. See 3 Campb. 496; 4 Taunt. 178. 493; 15 East, 517.

And it may be observed, that as a sailing [340] with convoy necessarily affords an additional security to

16. SANDERSON v. BUSH. E. T. 1814. C. P. 4 Campb. 54. n.

This was an action against the defendant as owner of a ship, for breach of a promise to sail with convoy. The vessel being at Oporto as a general ship, the plaintiff's agent shipped on board of her 100 pipes of wine, for which the master signed a bill of lading, stating the ship to be bound to the port of destination with convoy. *Gibbs, C. J.* clearly held that such a bill of lading, signed by the captain amounted to an absolute undertaking, by which the defendant, as owner, was bound that the ship should sail with convoy.

the ship and cargo, and as this condition, therefore, is a main inducement with merchants to send their goods, so a public notice that a ship will sail with convoy, or a bill of lading stating that a ship will so sail, amounts to an undertaking binding on the owner, that the vessel shall sail according to such notice or bill of lading.

17. DAVIDSON v. GWYNNE. E. T. 1810. K. B. 12 East. 381.

A charter-party stipulated that the ship should join the first convoy that sailed after she should be loaded from England for Spain or Portugal, or either: the declaration averred, that the vessel sailed with the convoy (without saying the first convoy) from England to Lisbon. To this the defendant pleaded, that the master having taken on board a cargo loaded by the defendant as freighter, was ordered by him immediately to proceed and join the first convoy sailed, to wit, from Portsmouth to London; and that although neither wind nor weather prevented, the plaintiff neglected to proceed, and join such first convoy. This plea was held bad, upon general demurrer.

18. WILSON v. FODERINGHAM. E. T. 1813. K. B. 1 M. & S. 468.

The charterer of a ship from L. to B. and back, pleaded to an action brought against him by the owner, on the charter-party, for not providing a

Nor is the charter-party

sufficient cargo at B.; that the ship sailed on the voyage from L. without a convoy, contrary to the 43 Geo. 3. c. 57. and that the plaintiff was privy to and knew the same. Demurrer and joinder. The words of the act were adverted to by counsel in arguing against the demurrer. The 1st section enacts, that it shall not be lawful for any ship, &c. to sail from any port or place whatever, unless under convoy; which, it was urged, was an express declaration of the illegality of the voyage independent of any penalty; that this was confirmed by section 4. which makes insurances upon all ships sailing without convoy, contrary to the act, void to all in tents and purposes; and that for that cause, in *Hichley v. Walton*, (3 Taunt. 131.) the Court of Common Pleas held the voyage illegal; and yet the policy in that case, as the charter-party in this, was made while it was in doubt, whether the ship would sail with or without convoy. *Per Cur.* In *Hinckley v. Walton* there is no doubt that the assured was instrumental within the words of the act, to the ship's sailing as it did. And in a former case of *Cohen v. Henckley*, (1 Taunt. 249.) it was considered that the policy was not avoided by the ship's sailing without convoy, unless the party interested was instrumental in her so sailing. We therefore think, in this case, that the defendant was not excused because the captain neglected to comply with the provisions of the act, it not being in contemplation of the parties, at the time of entering into the contract, to violate the regulations of this act. Our opinion is also upheld by the consideration that if a contrary rule were suffered to prevail, in every case where the captain did not comply with the regulations of the act in one instance, he would be discharged from fulfilling the terms of the charter-party, from which this inconvenience would accrue, that in every case we should have to estimate the moral rectitude of the captain.—Judgment for the plaintiff. [341]

19. MAGALHAENS V. BUSER. T. T. 1814. C. P. 4 Campb. 54.

This was an action against the owner of a ship, for a breach of an undertaking to sail with the convoy. It was held to be a sufficient defence, that the merchant himself was the cause of it. The owner had engaged to sail from the Douro to London, with convoy; and the plaintiff had agreed to load her with 100 pipes of wine. In the morning of the 4th of November, the day appointed for the sailing of the convoy, she completed her cargo, and was ready for sea, except that a number of the plaintiff's wine had not been put on board. The captain remonstrated repeatedly with the plaintiff's agents, upon the delay, but was not able to get the last parcel alongside till mid-day. The other ships belonging to the convoy had dropped down the river. He immediately followed them, and from that time had used every effort to join the commodore. Had the wind continued, he would have succeeded; but it fell calm, and all his endeavours failed. *Lord Ellenborough* held, under these circumstances, that the master was excused, the owner himself having caused the injury of which he complained, and by implication, therefore, having waived the performance of the condition. The freight or may of course dis- pense with the cove- nant in which he has bound the master for his own benefit.

20. HINCKLEY V. WALTON. T. T. 1810 C. P. 3 Taunt. 131.

In this case, the question before the Court was, whether a certain vessel had complied with the conditions of her licence; and by such compliance, had entitled herself to sail without convoy. The licence was granted to sail without convoy, provided she should be manned and armed as stated in the representation upon which the licence was granted. The ship sailed with the number of men and guns stated in the representation; but had some put on shore in the course of the voyage; and had, therefore, less than the complement stipulated when captured. Under these circumstances the Court decided that the conditions of the licence had not been complied with, and that the vessel had, therefore, sailed without convoy, contrary to the act. But if he is discharged only on a certain condition, he must strictly adhere to its terms

2. As to the covenant to perform the particular voyage.

(1 a) In general.

1. LEWIN AND OTHERS V. THE EAST INDIA COMPANY. M. T. 1794. Peake, N. P. C. 241.

The ship must, when she has set sail,

In an action on the case by the plaintiff on a charter-party, from which it

proceed on appeared that the plaintiff had let a vessel to the East India Company for a certain voyage in *trading and warfare*, the declaration alledged, that the defendants had, without the plaintiff's *knowledge or consent*, sent the ship upon a voyage of *discovery*, and not upon a voyage of *trade or warfare*, and upon that in further [242]
in further purposes to appeared, that the son of the plaintiff had given his consent and that the father had retired from business, and the son now carried it on. *Per Lord Kenyon*. That voyage of discovery is clearly not within the terms of the charter-party, and I thought that the plaintiff would have been entitled to a verdict; but as the son of the ship-owner must be considered as his father's agent, I am of opinion that his consent was sufficient; therefore, the plaintiff must be nonsuited.—Plaintiff's nonsuited.

2. PULLER V. STENIFORTH. E. T. 1809. K. B. 11 East. 232.

But both the Court of King's Bench,

It was covenanted in a charter-party, that the master should remain 40 days at Petersburg, to dispose of the cargo, and if he should not succeed in that time, that he might then bring it back to England; but instead of which, the master not having succeeded in disposing of it in 40 days, proceeded to Stockholm, and there sold the cargo with the best intentions, and took in other goods for freight, with which he returned to London; it was decided that he committed no deviation within the substantial meaning of the charter-party, and therefore was entitled to his freight under the deed, after carrying to the account of the merchant the freight earned in bringing the goods from Stockholm.

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And Common Pleas, have looked favorably to the exact performance of the terms of the deed, where any

3. BELL V. MILLER, E. T. 1810. C. P. 2 Taunt. 285.

It was covenanted in charter-party that the master should remain 40 days at St. Petersburg, to dispose of a part-cargo of lead; and if he should not be able to effect it in that time, he should bring it back to England. Upon bringing it back, the merchants were to pay him 2,700*l*. but if the voyage succeeded, they were to pay 4,000*l*. Having waited the stipulated time without effecting the sale, and thinking that he might find an advantageous market at Stockholm, or at least, by taking in a homeward cargo there, might save the

* Where the agreement is to sail and proceed direct to such a port, it has been seen, that any deviation in proceeding there, will subject the captain or owner to an action; and in such a case it is necessary to sail to the port itself. But circumstances may, and frequently do, occur, which render it unsafe for vessels to sail direct to her loading port or port of discharge; and where there is any danger in her doing so, it is usually agreed that she shall sail to the port, "or so near thereto as she may safely get," in which case it is not necessary to sail to the port itself. It may become a question, what is a sailing so near thereto as safety will allow; which must depend upon the circumstances of each particular case, whether the danger apprehended be that of falling into the enemies' hands, or incurring a confiscation of the ship or cargo, from offending against any foreign ordinance or regulation, or arising from the shallowness of the coast, or rocks, shoals, or the like, Molloy says, if the ship put into any other port than what she was freighted to, the master is liable to damages to the merchant; Mol. b. 2. c. 4. s. 10. Again it is said by him and Mayhew, that if a ship enter any other than her destined port, though against the master's will, as by a storm, or the like, the goods must be conveyed to that port at the master's expense; Mol. 99; Mol. b. 2. c. 4. s. 9. These authors, of course, do not contemplate the existence of the modern exception of such exception of such perils in the charter-party, by which clearly the master will be excused, if he be thereby prevented from reaching the destined port. In the event of an accident, it is said, that the masters and two mariners should make protest of the fact before the proper officer, at the first opportunity, or else there may be further danger; which seems to mean the loss of the freight; Mal. 99. Beawes observes, that when a ship puts into any other port than she is bound to by the charter-party, the master is liable to answer for all the damages that may happen thereby; and if the master voluntarily and without good reason put into such port, and materially deviates from the voyage, perhaps the right to freight may be thereby affected, though the ship afterwards reach her destined port, and make a right and true delivery of the goods; for it cannot be said in such case, that the goods have been carried the voyage contracted for; nor can the master have it in his power to go wherever he pleases, and put the merchant to his action for damages; but at all events, the former by such conduct will subject himself to pay damages, and the amount will be in the reasonable discretion of a jury. If the master was forced into the foreign port by storm, enemies, or tempest, that will not certainly affect the right to freight, if the voyage be afterwards completed; Beawes, 177; see Lawes on Charter-parties, p. 60, 61, and 62,

merchants from a total loss of the freight of the lead, the master, instead of immediately returning to England, sailed for Stockholm, and there took in a homeward cargo of hemp, with which, and the lead, he then returned to Eng-

* The principle of the decision in this case appears to be, that the parties themselves, in the charter-party, fixed the sum to be paid for the failure of their voyage; and that the voyage having failed, but the master having performed his full duty, he was entitled, as a matter of course, to this sum. That as far as respected the return cargo, he was bound, indeed, to bring back the lead; but as the greater part of his ship was unoccupied, and the occupation of it with a cargo for himself did not interfere with any possible interest of the merchant, whose business in fact was concluded, there could be no objection to his taking in such a portion of the homeward cargo on his own account. Mansfield, C. J. indeed said, that he considered it as a mere contract to take certain goods to Russia, upon sale or return; and that he could see no reason why, in the return voyage, the captain might not earn what else he could, by taking other goods on board for his own benefit. "In common cases of charter-party," said his lordship, "there usually is a covenant that the freighter will supply a certain quantity of homeward freight at the foreign port, and if he does not, the plaintiff has his action on the covenant against him; but suppose instead of leaving the damages open, he stipulates, 'if I cannot provide a cargo for you, I will pay you so much,' would not the owner, in that case, have a right to take goods on board for his own account. His ship is at full liberty for him to make any other profit of, and in such case he doubtless would insist on more or less liquidated damages, according to the chance he foresaw of getting freight home from the place where he was going; he would raise or lower his demand accordingly, and in such case I see no reason why the person who had stipulated to pay such liquidated damages should be discharged for any part thereof on account of the profit which the plaintiff might make by the cargo supplied by any other person;" see 2 Holt on Shipping, 48.

It is interesting to remark, says Lord Chief Justice Abbott, the coincidence of this decision of the Court of Common Pleas with the sentiments of two learned foreigners on an article of the French Ordinance, somewhat similar to the particular agreement of these parties. In the first place it will be recollected, that the parties had fixed a sum, to be paid in the event of the merchants not loading the ship, and that this sum was about half of what the master would be entitled to if he had brought a cargo. The case did not stand upon a general covenant to load the ship; the proper remedy for a breach of such a covenant, according to the law of England, would be an action for damages; and in estimating the damages, the jury would make a deduction for such benefit, if any, as the master might derive from bringing the goods of other persons; but if he should be obliged to return empty, they would award damages equivalent to the sum that would have been made payable by the merchant for a full cargo; taking care on one hand that the master should lose nothing, and on the other hand that he should gain nothing by the breach of the merchant's contract. And this agrees with the opinions of Valin and Pothier on one of the articles of the French Ordinance, which imports, that the merchant who does not load the quantity mentioned in the charter-party, shall, nevertheless, pay the freight as if the whole had been laden; *Ordonance de la Marine du Mois d'Avoust, 1681. Liv. 3. Tit. 3. Fret. Art. 3.* Notwithstanding this rule, they say, if the master procures goods from other persons, the freight that he derives from them shall go in diminution of the sum to be paid by the merchant; Pothier, *Charte-Partie*, num. 76; for the Ordinance awards the whole to him only by way of indemnity; 1 Valin, p. 642. But there is another article of the ordinance, which, as a general rule, is very extraordinary. "If the contract be for a certain quantity of goods," not the entire ship, "the merchant, who will withdraw his goods before the ship's departure, may cause them to be unloaded at his own expence, on payment of a moiety of the freight;" *Fret. Art. 6.* This is analogous to the particular stipulation in the charter-party in the above case reported by Mr. Saunton. The reason of this article, says Valin; 1 Valin. 646; is, that the master may find other goods to re-place those that are withdrawn, and a moiety of the freight is considered as a sufficient recompence for the delay that may be occasioned, from whence it follows that the master shall have the moiety without deduction, although in the end he may obtain a full cargo. Pothier, with more precision, says, the moiety of the freight which the merchant pays in this case, being the price of the risk that the master runs of not being able to let other persons the part of his ship which the merchants goods ought to occupy, or of not finding an equally valuable freight, he ought to have the profit of this moiety, although he may be able to let out this part for an equal or even a greater freight: for having run the risk of losing the freight of this part, if he had not been able to let it, he ought to have the profit of it. The master, by relinquishing under this obligation of law a moiety of the freight to the freighter, acquires the right of employing for his own benefit the part that had been let to him; *Charte-Partie*, num. 78. So in the case of the above charter-party, the master, having agreed to accept, as a substitute for his general right to an equivalent in damages, in case the merchant should not load the ship; a fixed sum short of the price of a full cargo, by which he might be a loser if he could not obtain a cargo elsewhere, was entitled to the whole of the stipulated sum as the price of the risk, if he had the good fortune to find other persons who would load his ship; see Abbott on Shipping, p. 212,

[344] land. The clear profit of bringing this cargo was about 2,400*l.*; the sum payable under the charter-party, as before said, if the voyage had been successful, would have been about 4,000*l.*; the master offered to settle the account with the merchants. by charging them with what would have been due if he

It may not be here inappropriate to enter into a detail of the rules which are followed by our courts, as appertaining to this subject, both as a guide to the construction to be put upon such a covenant in the charter-parties, and as elucidating the principles applicable to general ships, upon which footing charter-vessels must in many instances be viewed, owing to the manifold exceptions now introduced into such deeds. As a general rule, it may be therefore laid down, that the master must proceed to the place of destination without delay and without stopping at any intermediate port, or deviating from the straight and short course, unless such stopping or deviation be necessary to repair the ship from the effects of accident or tempest, or to avoid enemies or pirates, by whom he has good reason to suspect that he shall be attacked if he proceeds in the ordinary track, and whom he has good reason to hope that he may escape by delay or deviation, or unless the ship sail to the places resorted to, in long voyages, for a supply of water or provisions by common and established usage; *Roccus*, not. 52; *Park on Insurance*, c. 17; of Deviation, *French Ordinance*. liv. 3. tit. 8. And if the ship has the misfortune to meet with enemies or pirates, the master must perform the part of a valiant man, and make the best resistance which the comparative strength of his ship and crew will allow; *Ordinance of the Hanse-Towns*, art. 35, 36, 37; *Roccus*, not. 70. If the ship be driven into a port out of the course of the voyage by tempest, or the master sail thither for any of the above mentioned reasons, he must wait no longer than necessity requires, but sail again without delay, and for that purpose supply his ship with the requisite necessaries, or repairs, as expeditiously as he can. If by reason of the damage done to the ship, or through want of necessary materials, she cannot be repaired at all, or not without very great loss of time, the master is at liberty to procure another ship to transport the cargo to the place of destination; *Laws of Oleron*, art. 4. and *Cleirac* thereon, *French Ordinance*, liv. 3. tit. 8; *Frct.* art. 11. and *Valin* thereon; *Molloy*, book 2. c. 4. s. 5; *Ordin. of Antwerp*, 2 *Magens*, p. 14. art. 3; *Ord. of Rotterdam*, 2 *Magens*, p. 164. art. 147, 148; see also the judgment delivered by Lord Mansfield, in the case of *Lake v. Lyde*, 2 *Barr.* 889. But if his own ship can be replaced, he is bound to send the cargo by another, but may detain it till the repairs are made, and even hypothecate it for the expence of them, that is, supposing it not to be of a perishable nature; if it be of such a perishable nature, he ought to tranship or sell it, according as the one or the other will be most beneficial to the merchant; see the judgment pronounced by Sir W. Scott, in the case of the *Gratitudine Mazzola*, 3 *Rob. A. R.* p. 240. So if the ship had been wrecked and the cargo saved. And if on the high seas the ship be in imminent danger of sinking, and another ship apparently of sufficient ability be passing by, the master may remove the cargo into such ship; and although his own happen to outlive the storm, and the other perish with the cargo, he will not be answerable for the loss. The disposal, however, of the cargo by the master is a matter that requires the utmost caution on his part. He should always bear in mind that it is his duty to convey it to the place of destination. This is the purpose for which he has been intrusted with it; and this purpose he is bound to accomplish by every reasonable practicable method. Every act that is not properly and strictly in furtherance of his duty, is an act for which he and his owners may be made responsible; and the law of England does not recognize the authority of any tribunal or officer acting upon his suggestion, or at his instance; but will scrutinize their acts as much as his own; see *Hunter v. Prinsep* and others, 10 *East*. 378. *Van Omeron v. Dowick* and others, 2 *Camp.* 42. The hypothecation of the cargo is allowed by the marine law, and by the law of England also; but it is allowed in those cases only in which it is made in furtherance of this purpose. The sale of a part has been allowed; but it was allowed in a case in which the hypothecation of the whole would have been lawful, and because it was considered as a matter equivalent to such hypothecation. Hypothecation imports a pledge without immediate change of possession (*propre pignus dicimus, quod ad creditorem transit, hypothecam; cum non transit nec possessio ad creditorem*; *Dig.* 13. 7. 9. 2.); it gives a right to the party, who makes advances upon the faith of it, to have the possession, if his advances are not repaid at the stipulated time, but it leaves to the proprietor of the things that may be hypothecated, the power of making such repayment, and thereby freeing them from the obligation. It is, therefore, contrary to the nature of this proceeding, and consequently contrary to the duty, and beyond the power of the master, to engage that the lender shall, at all events have the goods delivered at their place of destination, to him, or his agents, to be there sold and disposed of by him or them, without reserving the right of redemption to the merchant; and such an engagement will not be obligatory upon the merchant, but he will still have the right to take his goods upon payment of the money, for which they may have been engaged; *Johnson v. Graves*, *Taunt.* 344. It is obvious, that this purpose, viz. the covenancy of the goods to the place of destination, cannot possibly be effected by a sale of the whole of them; and therefore, according to the principles before-mentioned, the master cannot, in his charterer of master, have authority to make such a sale; nor does the law superadd such authority; *Van Omeron v.*

had loaded the ship homeward, and allowing them the benefit of the clear earnings that had been made; thus demanding from them about 1,600*l.* But this they refused, and insisted that the earnings should go in diminution of the 2,700*l.*, &c.; and that the master was, therefore, entitled only to about 600*l.* Upon this the master brought an action in the court of Common Dowick and others, 2 Campb. 42. But perhaps a better reason for this rule of law may be found in the public expediency of withholding so dangerous a power from the master, and thus rather suffering the smaller evils of the few particular hardships resulting from the prohibition, than incurring the danger of the most extensive frauds and mischief which such a power might occasion. Perhaps this restriction of the master has the same foundation with the liability of common carriers, for losses by fire, robbery, &c.; the preference of the less of two evils; the election of a limited and particular mischief, instead of a principle which would afford facility to a general abuse. The master is *de jure* the agent of the owner of the vessel, who is therefore bound by his acts as to all consequences resulting from his conduct of the ship and of the voyage. But he has no such extensive relation to the owner of the cargo as respects the freighter; he is only a carrier, unless specially constituted an agent or supercargo; 1 Rob. 84. 151. 156. Therefore, except in a case of the last necessity, which requires the sacrifice or hypothecation in part or whole of the cargo, as well as of the ship, no act of the master can affect the owner of the cargo; 2 Rob. 251. What then is the master to do; if by any disaster, happening in the course of his voyage, he is unable to carry the goods to the place of destination, or to deliver them there? To this, as a general question, it is apprehended no answer can be given. Every case must depend upon its own peculiar circumstances. The conduct proper to be adopted with respect to perishable goods, will be improper with respect to a cargo not perishable. One thing may be fit to be done with fish or fruit, and another with timber and iron; one method may be proper in distant regions, another in the vicinity of the merchant; one in a frequented navigation, another on unfrequented shores. The wreck of the ship is not necessarily followed by an impossibility of sending forward the goods, and does not, of itself, make their sale a measure of necessity or expedience; much less can the loss of the season, or of the proper course of the voyage, have this effect; Van Omeron v. Dowick and others, 2 Campb. 42. An unexpected interdiction of commerce, or a sudden war, may defeat the adventure, and oblige the ship to stop in her course; but neither of these events doth of itself alone make it necessary to sell the cargo at the place to which it may be proper for the ship to resort. In these, and many other cases, the master may be discharged of his obligation to deliver the cargo at the place of destination, but it does not therefore follow that he is authorized to sell it, or ought so to do. What then is he to do? In general it may be said, he is to do that which a wise and prudent man will think most conducive to the benefit of all concerned; see the judgment of the Court of Common Pleas, delivered by C. J. Mansfield, in *Christy v. Row*, 1 Taunt. 313. The Court appears to have thought, that a master bringing back goods under such circumstances, might be entitled to a compensation from the proprietors of the goods, although they held he could not recover any thing against a character of his ship, who was not the proprietor of the goods, the service not being for his benefit. In so doing he may expect to be safe, because the merchant will not have reason to be dissatisfied; but what this thing will be, no general rules can teach; French Ordin. tit. Du Fret. art. art. 6. Some regard may be allowed to the interest of the ship and its owners; but the interest of the cargo must not be sacrificed to it. Transshipment for the place of destination, if it be practicable, is the first object, because that is furtherance of the original purpose; if that be impracticable, return, or a safe deposit, (see an instance of deposit which seems not to have been questioned in *Liddard v. Lopes* and another, 10 East. 526.) may be expedient. A disadvantageous sale (and almost every sale by the master will be disadvantageous) is the last thing that he should think of, because it can only be justified by that necessity which supersedes all human laws; see *Abbott on Shipping*, 250, &c., and see 3 Moore, p. 115. All such emergencies should be, however, provided for by special clauses in charter-parties, so as to obviate any doubts, and more effectually to answer the intentions of the parties, than any arrangements which may otherwise be made for them.

If the master, being compelled to take refuge in a foreign court during the course of his voyage, has occasion for money for the repairs of a ship, or other expense necessary, to enable him to prosecute and complete the voyage, and cannot otherwise conveniently obtain it, he may, as hath been before observed, either hypothecate the whole cargo, or sell a part of it for this purpose; the *Gratitudine*, *Mazzola*, 3 Rob. A. R. 240. In the latter case, if the ship reach the place of destination, the merchant will be entitled to receive the clear value for which the goods might have been sold at that place; *Alers* and others v. *Tolin* and others, at Guildhall, Oct. 30, 1802; before Lord Ellenborough, C. J. and a special jury; *Abbott*, 257; *Laws of Oleron*, art. 22; *Ordin of Wisbuy*, art. 35. 45. 69; French Ordinance, liv. 2. tit. 1; *Du Cupataine*, art. 19. liv. 3. tit. 3; *Eret*, art. 14. and *Valin* thereon; *Pothier*, Ch. Partie, num. 53. 34; see also *Molloy*, book 2. ch. 2. s. 14.; and *Ordin. of Rotterdam*, art. 133. 134. 135. 2 *Magens*, 102. 103; if the ship afterwards perish, and reach not the destined port, the Ordinance of Wisbuy expressly declares, that

- [346] Pleas upon the charter-party, for the non-payment of the 2,700*l.* with the per centage and gratuity. At the trial, the jury gave a verdict for those sums. An application was made to the court to reduce the verdict to the sum that had been previously offered by the merchants; but, after argument, the verdict was allowed to stand. *Vide* Abbott, 211.

4. BORNMAN V. TOOKE. E. T. 1808. 1 Campb. N. P. C. 377.

The non-performance of this covenant is not, however, a bar to the recovery of freight.*

It was stipulated by a contract made at Riga, that the master should sail from thence with the first favourable wind direct to Plymouth. Instead of sailing direct to his place of destination, he put into Copenhagen unnecessarily, where the ship was detained a long time; and in consequence of such deviation, the merchant lost the benefit of the insurances which he had effected, and put to considerable expense in effecting others; the ship being afterwards liberated, voyage performed, and the cargo delivered and accepted, it was held that an action might be maintained for the stipulated freight. The merchant insisted that the special contract was avoided by the deviation, and that the master could only be entitled to a reasonable compensation for the conveyance of the cargo, in the estimation whereof allowance must be made for the expence which the merchant had incurred through his fault; but this was not allowed, there being a special freight, and this agreement substantially performed, and the proper remedy of the merchant being a cross action for the recovery of damages.

After the particular voyage is once fixed, and bills of lading signed, it can not be altered.

(1 b) *As to its alteration.*

1. DAVIDSON V. GWYNNE. E. T. 1810. K. B. 12 East. 381.

In this case it appeared that it was stipulated in a charter-party that the vessel should be at the disposal and direction of the freighter, his agents, and assigns, for three months, and should proceed to any port or ports in Spain or Portugal, or either, as should be ordered by the freighter, his agents, or assigns; and the master proceeded to Lisbon, according to orders, and there delivered the cargo; it was held no answer to an action on the charter-party for freight of such voyage, that after the vessel had sailed from London, and before her arrival at Lisbon, the freighter had ordered the master to proceed to Gibraltar, and there deliver her cargo, which order had been disobeyed. A plea to that effect had been held bad on general demurrer. In the course of the argument, Lord Ellenborough said: unless the first order was contradicted the money raised by this sale shall be paid to the merchant by the master; (Art. 68. see *Emerigon*, tom. 2. p. 445. where the several authorities here referred to are cited,) and Cleirac, Kidrick, Valin, and Pothier, agree in opinion, that the money is, in such a case, due not only from the master, but also from the owners, because it was expended for a purpose of which they were, at all events, liable to sustain the charge; but none of the other ordinances contain such a provision; and *Emerigon* contends, on the authority of the Consolato del Mare, and of the ordinances of Oleron and Antwerp, that the money is only payable in case of the safe arrival of the ship, which was the opinion also of several persons whom Pothier consulted. And this doctrine seems the most reasonable, as the merchant is not thereby placed in a worse situation than if his goods had not been sold, but had remained on board the ship; *vide* Abbott on Shipping, p. 256-7.

The liability of the owner to pay for repairs may be, however, divested by an express and exclusive credit given to another. It is a general rule, that the law will not impose a contract upon a man against his own will and knowledge. Where there is concurrence of equity and legal liability in favour of an obligation; where a strong equity demands it on the one part, and it is not opposed on the other by any incongruity with a principle or maxim of law, the law, in all such cases, will presume these tacit contracts. This, indeed, is the principle to all implied *assumpsits*. And the law will not extend this rule so far as to supersede the first principle of all contracts—that intercourse, knowledge, and consent of the contracting parties, which constitute what is legally termed their privity. Hence it will not extend these implied contracts into cases and circumstances where such implication is rebutted by a fact directly contrary; such as be a distinct contract with another, or where there is a total ignorance and non-intercourse with the parties, and where the one had no contract with the other in contemplation; and, therefore, where a master, being in a foreign port, raised the money for repairs upon the sole and exclusive credit of the freighter, it was held that the owner was not liable, as the credit was given to him; 4 Camp. 254.

* Provided the master during the voyage take all possible care of the cargo, *vide ante*, tit. Carriers.

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ed by the second, the court would, if possible, make the two orders consistent; and there being no incompatibility upon the face of them, they might well stand together. His lordship said: supposing there had been a written order to proceed to Lisbon and Gibraltar, would not that order have sustained the allegation in the declaration, that the master was ordered to proceed to Lisbon? And as to the objection, that the partial performance of the orders given might have frustrated the whole intention of the voyage, *Le Blanc* and *Bailey, Js.* said that the freighter and his agent having accepted the goods at the port where they were discharged, could not afterwards make that objection. *Bailey, J.* observed: that the master had signed bills of lading for Lisbon under the freighter's order, by which he had bound himself to deliver the goods there to the consignees. Afterwards, *Lord Ellenborough*, in delivering judgment said: the question is, whether the ship, having been first ordered to proceed to Lisbon, and goods loaded, and bills of lading signed by the plaintiff for that port, a subsequent order, given by the freighter to go to Gibraltar, was a bar to the plaintiff's claim for the freight out of Lisbon and back again to London. Now, after the freighter's order to the captain to go to Lisbon, and the latter had received on board goods, and signed bills of lading, for that place, it was not competent for the freighter to countermand that order; he could not capriciously change the destination of the vessel, without recalling the bills of lading, or at least offering sufficient indemnity to the captain against them. But nothing of that sort was stated. The case then stood thus; that the freighter, after giving an order to the captain to go to Lisbon, and suffering him to bind himself by signing bills of lading to deliver the goods there, gave him another order to go elsewhere, and made himself liable to actions for the breach of his engagements upon all those bills of lading. This the freighter had no right to do; and therefore the breach of that subsequent order afforded no bar to the plaintiff's claim for freight for the voyage which he prosecuted under the first order, and to the prosecution of which he had bound himself by the bills of lading before he received such second order. *Grose, J.* said, after the first order given to go to Lisbon, under which goods had been received on board, and bills of lading signed, by which the master made himself liable to answer in damages to the owners of the goods if he did not carry them according to his undertaking, it would not be permitted to the freighter to countermand the voyage, and make the master liable to actions by those to whom he had so bound himself.*

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2. *BURTON V. SHARPE. H. T. 1810. K. B. 2 Campb. N. P. C. 528.*

This was an action for charter and demurrage, on a memorandum for charter,† for a voyage from Buenos Ayres and back. When the ship arrived in

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Unless the master be authorised to permit it.

* One of the laws of Wisbuy is, that if a ship freighted for one harbour is forced to put into another, the master to clear himself must declare upon oath, together with two or three of his ablest mariners, that he was forced into that harbour by stress of weather or otherwise; and upon that the master may take his course again and finish his voyage, or else he may send the lading by other ships at his own costs, and then he shall be paid his freight; *Leg. Wils. 58.* Whether the ship be a general or chartered vessel, in such accidents as those adverted to by this law, it is certainly prudent and right to make a protest of them; though such protest is not, by the common law, necessary, to support an action for the freight, or even evidence in such action.

† If the plaintiff declared specially upon the memorandum, for charter only, whether he averred that the original voyage was performed, or another established for it, it is clear that he could not recover, whatever might be his claim, to a compensation for the benefit received by the defendants's acceptance of the goods, at a different port from that to which she was originally chartered; for in this case, there was a clear variance as to the voyage between the declaration and evidence; and in the second, there was clearly no performance of the voyage in the charter-party, or excuse for the non-performance of it; at all events, if the charter-party was under seal; see *Smith v. Wilson, 8 East. 437.* Supposing the acceptance of the goods by one of the defendants, and his directing the ship to wait for a return cargo, was (as it seems to have been) sufficient evidence for a new contract, to pay the plaintiff a reasonable compensation for the carriage of the goods and detention of the ship, the plaintiff might have declared in *assumpsit* specially on such new contract, or generally by way of *indebitatus assumpsit*. But what the contract, or nature of the action, or declaration, was, does not appear by the report; see *Laws on Charter-parties, p. 64.*

The captain has no right under any circumstances of difficulty, to put an end to the voyage, and sell the goods though expediency may require it.

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Where a delivery of the goods is stipulated for in the charter-party, the clause must be strictly performed.

the river Plata, it was found that Buenos Ayres had been recaptured by the Spaniards; she then went to Monte Video, where her outward cargo was accepted by one of the defendants, who desired that she might wait for a return cargo, but which finally could not be procured. The plaintiff contended, that Monte Video had, under these circumstances, been substituted for Buenos Ayres, and therefore the defendants were liable the same as if the ship had performed the voyage for which she was chartered: and that the captain represented the plaintiff, and had authority to make this substitution. But Lord Ellenborough held otherwise, and the cause was afterwards referred.

(1 c) *As to its abandonment.*

VAN OMERON v. DOWICK. H. T. 1809. K. B. 2 Campb. 42.

This was an action against the defendants as the owners of the ship, on a bill of lading signed by their captain, for two cases of cutlasses shipped to be carried from England to Surinam, with the usual exception of the act of God and accidents of the seas, &c. It appeared that the ship sailed in time under convoy with other Surinam ships, and by the error of the commodore they got to leeward of that settlement; and having ineffectually endeavoured to beat up to windward, they were forced to put into Demerara towards the end of August, and remain there till December, when a ship of war arrived to convoy them to Surinam; but after nine or ten days beating about, they were carried farther to leeward. The commodore then finding the attempt hopeless, gave orders to make for Grenada, where the vessel put in, and the goods were sold by auction under the captain's directions. It was contended, that the captain, under such difficult circumstances, was to be considered as the agent of the shipper of the goods, as well as of the ship-owner; that the defendants had not been guilty of a breach of contract, the captain having done every thing in his power to reach Surinam, and been prevented from one of the risks excepted in the bill of lading. But Lord Ellenborough held that the captain could not put himself in the situation of the owner of the goods, or make an end of the voyage; and it was difficult to say, whether there was a natural impossibility of performing it. His lordship thought the sale in this instance an injurious conversion. The plaintiff had a verdict.*

4th. *As to the covenant relating to the delivery of the goods.*

1. *In what cases there must be a delivery.*†

1. Where the arrival of the ship at its port of discharge and a delivery of the goods are made an express condition precedent to the payment of freight, such arrival and delivery must always be averred and proved; for nothing will amount to a performance of the condition but a strict compliance with its provisions, as an express waiver and dispensation with such compliance, where it is in the power of the party to obtain a right to the sum claimed by performance. *See Doug.* 684; and *1 T. R.* 638.

* It should seem that the action might have been *assumpsit* for non-delivery of the goods, or in trover; or the plaintiff by proceeding in case might have declared both ways. But what the form of action really adopted by the plaintiff, or how he declared, does not appear; though as it is said that the action was on the bill of lading, and his lordship spoke of the sale of the goods amounting to a conversion of them, it seems that the plaintiff had declared in case, as above suggested, that seems the most advantageous mode of declaring, unless indeed the captain had received the produce of the sale, in which case the opportunity of adding a count for the money so received, might have been a reason for preferring the action of *assumpsit*; see *Laws on Charter-parties*, p. 63.

† When the ship arrived at the place of destination, the master must take care that she be safely moored or anchored; *Ord. on Wisbuy*, art. 36; and without delay deliver the cargo to the merchant or his consignees, (this is true as a general rule; the exceptions to this rule arising out of the power of the consignor to countermand the delivery, and stop the goods, before they come to the possession of the consignee, will be treated of distinctly under the title of "Stoppage in Transitu"), upon productions of the bills of lading and payment of freight, and other charges due in respect of it; and if by the terms of the charter-party a particular number of days is stipulated for the delivery, either generally or by way of demurrage, he must wait the appointed time for that purpose. These charges are in ordinary cases *primage*, and the usual petty average, as expressed in the bills of lading; in case of any loss, that became the subject of general average, the civil law imposed upon the master the duty of adjusting and settling such average, and obtaining from the owners

2. SMITH v. WILSON. T. T. 1807 8 East. 437..

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This was an action of covenant on a charter-party for non-payment of the freight, &c. The material covenant on the part of the plaintiff was, that the ship being arrived at her destined port, the commander should make a right and true delivery of her cargo to the freighter, agreeably to the bills of lading; and the defendant's covenant was to pay so much per month for the time the ship should be employed, during the intended voyage to Monte Video and back to her port of discharge, in full for the freight during such voyage, to commence when she should be ready to receive her cargo, and end when she had finally discharged it; and also to pay pilotage and port charges during the voyage; such freight, &c. to be paid on the arrival and discharge of the ship at her destined port in Great Britain. The declaration stated, that while the ship was prosecuting her outward voyage, she was, without the plaintiff's de-

And it has been hold en, that a mere endeavor to perform such a duty, where per formance is out of the power of the plaintiff is insuffi cient, tho' the defend ant in such case re lease him from actual perform ance.

of the cargoes saved the sums to be paid as a contribution to the loss, and allowed him to detain the cargo for that purpose: Dig. 14. 2. 2. The power of detaining the cargo is also case re given by the laws of Oleron (art. 9.) and by the French Ordinance, liv. 3. tit. 8. du jet. art. 21. It is said to be the practice in this country, in the case of a general ship. for the mas- from actual ter to take security from the merchants before he delivers the goods for payment of their perform shares of this contribution when the average shall be adjusted.

The cargo, as has been already observed, is bound to the ship, as well as the ship to cargo; *Roccus*, not. 88; *Ord. of Rotterdam*, 2 *Magens*, p. 101. art. 156 157; and therefore unless there is a stipulation to the contrary, the master is not bound absolutely to part with the possession of any part of his cargo, until the freight and other charges, due in respect of such part, are paid.

The covenant of the charter-party, or bill of lading, under which this duty is imposed on the master, is usually expressed in the following terms, or terms of the same substantial import, in the charter-parties now in use: "And the said master, upon his arrival there (the outward port), will address himself to the agents or correspondents of the said freighter, and as soon after as may be, make a discharge, and a right and true delivery of the said goods and merchandizes, unto the agents, correspondents, or assigns of the said freighter, according to the bills of lading, and so end the said outward voyage." As the holders of the bill of lading are presumed to be well informed of the propable period of the vessel's arrival, and as in an event such arrivals are matters of notoriety in all maritime places, it is not the duty of the master to send notice of his arrival to the several assigns of the cargo; see 4 *Campb.* 154. As the master is not bound to give this notice, it is of no consequence whether the residence of the holders of the bills of lading be known to him or not. But if the means by which the holders of the bills of lading are to obtain this information of the ship's arrival are defective, such as if there be any inaccuracy in the entry of the ship's name at the custom-house, whereby the owner of the goods, notwithstanding proper inquiries for that purpose should be deprived of the usual mode of being informed of the ship's arrival, it then becomes the duty of the master to apprise him of the ship coming to port; see *Holt on Shipping*, 98-9.

Where the covenant in the charter-party is for the right and true delivery of the goods, agreeably to the bills of lading, the party to the contract of affreightment is liable to an action for damages, in case of an incomplete or insecure delivery. *Malyne* (102) observes, that when coffers, packs, pipes, or other commodities, are delivered close packed or sealed, and afterwards received open or loose, the master shall be charged for it, until due trial and consideration thereof be had; and that he must answer for the harm which rats do to the goods in the ship for want of a cat; *Mal.* 98; see 1 *Wills.* 281. As to the damage for which the master shall be liable, it is also provided by the laws of Oleron and Wisby, that if the master and mariners do not trim the sails as they ought, and it happens that ill weather overtakes them at sea, and the mainyard shakes or breaks one of the pipes or bogsheads, the ship being arrived at her port of discharge, the master and four, six, or such of his mariners as the merchants shall require, must make oath that the wine was not lost by them, nor through their default, as the merchants charge them; and then the master and mariners shall be acquitted thereof; but if they refuse to make oath to that effect, they shall be compelled to satisfaction for the damage; for they ought to have ordered their sails aright before they departed from the port where they took in their loading; *Leg. Ol.* 11. So if it be alleged by the merchant, that, in consequence of the ship being ill laden and improperly governed, the wine is lost, the master shall be liable to make up the loss, unless the mariners declare the contrary upon oath, in which case the loss shall be the merchants'; *Leg. Wis.* 23. Again it is declared, that if from mooring the ship insufficiently or improperly upon her coming into harbour, the goods become spoiled or damaged, the master must make it good to the merchant; *id.* 36. Although such great importance is, by the above laws, attached to the protest of the master and his mariners, it certainly cannot in this or any other instance do away or alter the effect of any of the provisions in an express contract of affreightment; see *Laws on Charter-parties*, 93.

[352] fault, wrongfully seized and detained for a long time, at the expiration of which she was liberated; that it then became necessary to refit the ship, which was done accordingly, and that the plaintiff, from the time of the ship's being liberated and refitted, was ready to cause her to complete the voyage; that he tendered her to the defendant for that purpose, and requested him to give the necessary directions and instructions; but that the defendant refused to do so, and renounced the further prosecution of the voyage, and discharged the plaintiff therefrom, and dispensed therewith. The declaration then stated, that the ship was employed during the voyage for twelve months, and that the freight, according to the rate in the charter-party, amounted to so much; that if she had been employed by the defendant to complete the voyage, an additional freight would have been earned, amounting to a like sum for the like period of time; and that the agreed proportion of the pilotage and port charges amounted to a further sum. It then assigned a breach in the non-payment of the freight, pilotage, and port charges, so claimed. To this declaration there were seven pleas, upon the three first of which issues in fact were taken, to the three next there were demurrers, and to the last there was a special replication, upon which issue was taken by rejoinder. The question of law arose upon the demurrers to the fourth, fifth, and sixth pleas, the substance of which, however, it is unnecessary to state, because the Court, assuming them to be bad in law, held that the defendant was nevertheless entitled to judgment, because the declaration was bad in substance. The ground of their decision was, that by the terms of the charter-party, the freight, pilotage, and port charges, were all expressly covenanted to be paid on the arrival and discharge of the ship at her destined port in Great Britain, and therefore such arrival and discharge was a condition precedent to the plaintiff's right to demand them. And if the plaintiff had done all that he offered to do, and which the defendant discharged him from doing, still it would have amounted at most only to an endeavour to complete the voyage, and procure the arrival and discharge of the ship at her destined port; for the actual happening of that event did not depend upon him, but was liable to be disappointed by all the various accidents to which marine adventures are subject. The Court, in giving judgment, distinguished the case from those of *Jones v. Barkley*, 7 T. R. 638. and *Hotham v. the East India Company*, 2 Doug. 686. where, by doing an act in the power of the party, he would have acquired a full and instant right to the duty demanded. The said covenants of this kind had always received a strict construction, adverting to the case of *Bright and Cooper*, 1 Brownl. 21. and *Cooke and Jennings*, 7 T. R. 381. which they observed proceeded upon the same principle. Judgment was therefore given for the defendant, without considering the sufficiency of his several pleas.

3. *HAVELOCK v. GEDDES*. H. T. 1809. K. B. 10 East. 555.

An allowance for extra men was covenanted to be paid by the freighter, the residue of which (after part payment,) was not to be paid till the ship's discharge or return from her voyage. The ship sailed on a voyage to St. Domingo, where she arrived, but was burnt before her return. The Court held that such loss was a discharge of her from the freighter's employ, as if by the act of the freighter, on which such extra allowance became payable.

2. *What delivery is sufficient.*

(1 a) *As relates to the place of delivery.**

1. *LIDDARD v. LOPES*. H. T. 1809. K. B. 10 East. 526.

This was an agreement in the nature of a Charter-party, whereby the plaintiff let his ship to freight to the defendants, on a voyage from Shields to Lisbon with convoy, the freight to be paid on right delivery of the cargo. The ship sailed from Shields with her cargo, and joined convoy at Portsmouth, and after being detained near a month off Lymington, her sailing orders were recalled by the convoy in consequence of the occupation of Portugal by the enemy.

* A delivery, according to the bill of lading, would fully justify the captain, and those who allege an equity paramount to the bill of lading, and against the consignees, should assert it by a suit of their own; *Lowe v.* — 3 Mad. ch. 277.

Unless the non-performance of the deed were originally occasioned by the freighter.

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caused by the freighter.

The covenant to deliver is not in general performed until a delivery at the port mentioned in the charter-party.

emy. The defendants having refused to accept the cargo at Portsmouth, to which the ship returned, it was unloaded by the plaintiff, after notice to the defendants, and then was sold by consent of both parties without prejudice. On a question whether the plaintiff could recover freight *pro rata* or demurrage, the court decided in the negative.

2. CLARKE v. GURNELL. 1 Bulst. 167.

The plaintiff let a ship to one Boothby on freight, and covenanted that it should sail with the first fair wind, to such a place, and the defendant covenanted for Boothby, that for the freight of all the premises he would pay the plaintiff such a sum, for which the action was brought; after judgment for the plaintiff; error was brought, on the ground that the declaration did not allege that the ship came to her port of delivery. Yelverton, J. stated the difference to be that when the payment is to be made on a performance of a matter precedent; there always the party must allege the performance of such a matter to entitle himself to the payment, although it is otherwise where the performance is to be subsequent to the payment. In the principal case, therefore, he held, that the covenant being to pay so much for all the freight, the plaintiff must, to entitle himself to the money, expressly state the performance of his part of the contract, such as the preparation, sailing, and return of the ship, which was not alleged. Fleming, C. J. seems to have been of the same opinion; he said if the covenant were that the plaintiff should take the goods on board his ship, and transport them, and the defendant covenanted to pay him so much for the same when he returned to London, the former must show his taking of the goods, and transporting them, and also his return. Williams J. agreed in opinion with the other judges on the principle mentioned by Yelverton, J. that there being matter to be done by the plaintiff to entitle him to the money, viz. the preparing of the ship, and lading and transporting the goods, he could not recover without alleging performance. For these reasons the declaration was held bad, and the judgment considered erroneous by the three judges present; but the court not being full, they adjourned, and the judgment of reversal was not pronounced.

3. HOTHAM v. THE EAST INDIA COMPANY. M. T. 1779. K. B. 1 Doug. 277.

The charter-party stipulated for the payment of freight and demurrage upon the express condition of the ship's arrival at London in safety there, and making right delivery of the whole cargo. On her return home, she was stranded off Margate in a storm, and a great part of her cargo lost. The rest was damaged by the sea-water, but got out of the ship by persons sent down by the company, and brought to town in other vessels, and great expense was incurred to render it at all marketable. The ship was ultimately raised up out of the water, and brought to London, and it was held that the defendant's acceptance of part of the goods in the manner stated, though it was nothing more than what justice required, rendered them liable to freight for all that were saved, and demurrage.

4. SHEPARD v. DE BERNALES. E. T. 1811. K. B. 13 East. 565.

This was an action of covenant upon a charter-party, whereby the plaintiff agreed to carry a cargo of tobacco, and deliver the same to the correspondents, factors, or agents of the defendant, agreeably to bills of lading; and the defendants covenanted to ship the tobacco, to receive it either at Tangiers, St. Lucas, or Gadiz, giving notice within 15 days after the ship's arrival at Tangiers, at which of those places the said cargo was to be delivered, and on right and true delivery, agreeable to bills of lading, to pay, or cause to be paid, certain stipulated freight. The cargo was loaded, and bills of lading signed for delivery at Tangiers and St. Lucas, to John de la Piedra, or in his absence, to his Catholic Majesty's Consul at Tangiers, or their assigns; he or they paying specified freight. The ship arrived at Tangiers. Application was made to

† The ground of this decision seems to be, that a gross sum was payable for the freight of one entire voyage; for if one covenant to transport goods from place to place, and the other covenant to pay him so much for each delivery, these are several covenants, and the former may have an action for non-payment of the sum due for the carriage to any one of the appointed places.

And where the arrival of the ship at the port of destination is by the charter-party made a condition precedent to the payment of the freight, in an action for the freight it is necessary to aver and prove such arrival according to the terms of the deed. † 354 There is no doubt, however, but that if the delivery at one place be in the contemplation of the parties substituted for delivery at another, it may be averred in an action of covenant on the charter-party; and by receiving part of the cargo at the substituted port the freighters waive all objections concerning the delivery at that port. So a delivery at a port appointed by the freighter's agent;

John de la Piedra to know whether the delivery was to be there or at St. Lucas, or Cadiz. Orders were received from him to deliver at Cadiz. The cargo was accordingly delivered at Cadiz to the defendant's agent there, but the freight was not paid. Under these circumstances the question arose, whether the plaintiff was warranted in going to Cadiz at all (Tangiers and St. Lucas being alone mentioned in the bills of lading,) and in making a delivery there.

Per Cur. The charter-party stipulated for delivery at Tangiers, St. Lucas, or Cadiz, and the omission of Cadiz in the bills of lading, was in effect for the benefit of the captain, to relieve him from the necessity of going thither, if he should wish to decline it; but it did not take from him the power of going there. [355] if he should be willing so to do, and the defendant's correspondent's should desire it. If they chose to accept at Cadiz instead of either of the other places, why were they not at liberty to do so.

5. DAVIDSON V. GWYNN. E. T. 1810. K. B. 12 East. 381.

Or super-cargo, although not named in the bill of lading, is sufficient.

It was stipulated in a certain charter-party, that the vessel should be at the disposal and discretion of the freighter, her agent, and assigns, for three months, and to proceed to any port or ports in Spain and Portugal, or either, as should be ordered by the freighter, his agents, or assigns; and the master agreed to receive on board at London two super-cargoes, to be appointed by the freighter, and convey them free of passage money. The master at first received orders from the freighters to proceed to Lisbon, and was afterwards directed to go to Gibraltar, but the supercargo, before the vessel sailed, ultimately directed the master to go to Lisbon; and the master according to such orders, delivered the goods at Lisbon, which was held sufficient to enable him to recover the freight. The Court observed: from the nature of the appointment of a supercargo, where he is on board the ship, and the freighter is absent, it follows that he should have the same power in this respect as the freighter himself; for he is to take advantage of every circumstance as it arises, to act for the benefit of his employer in the adventure. If, indeed, the charter-party had been made for a certain voyage, that would be a different consideration; but we understand the charter-party as giving the freighter authority, (unless noticed by circumstances) from time to time by himself or agents, to alter the destination of the vessel and cargo, within the limits assigned.

(1 b) *As relates to the parties to whom the delivery is to be made.*

JOHNSON V. GREAVES. E. T. 1810. C. P. 2. Taunt. 355

Where the charter-party contains a covenant to deliver the goods to the freighters or their assigns, at London, a greenably to bills of lading, it must be averred and strictly proved, that the delivery was to the freighters or their assigns, according to the contract of affreightment.

[356] All that is necessary to constitute any persons the assigns of the freighters to whom a delivery of the goods

This was an action brought upon a charter-party, containing a covenant to deliver the goods to the freighters or their assigns at London, agreeably to bills of lading, for a voyage to any port or ports in Saint Domingo, and back to London. It appeared that the vessel had been unjustifiably carried into Jamaica by the *Dædalus* frigate, under pretence that part of the cargo was not protected by the licence. The rest was restored to the captain, who procured merchants, resident at Jamaica, to be bail for the return of it, on his giving them bills of lading of the whole cargo, and the merchants having paid the captors under a sentence of condemnation, the value of the goods and costs, their agents, when the cargo arrived in London, insisted on the freighters repaying the sums advanced, which they accordingly did under protest, in order to get possession of their goods. This was held not a delivery to them according to the charter-party, and consequently the plaintiff could not recover under it, either demurrage for the detention of the ship in Jamaica, or freight for the carriage of the goods from thence to London.

2. SHEPARD V. DE BERNALES. E. T. 1811. K. B. 13 East. 565.

The master covenanted in a charter-party to proceed with certain goods from London to Tangiers; there to apply to the correspondents, factors, or agents of the charterer, for orders whether he was to proceed to St. Lucas or Cadiz; and that pursuant to the orders he would make a right and true delivery of the cargo in full for the freight of the ship, at a certain rate in sterling money; and afterwards bills of lading were signed and delivered, making the cargo deliverable at Tangiers and St. Lucas, to J. P. (the charterer's agent at Tangiers) or his assigns, he or they paying freight for the said goods, so much in

sterling money at the current exchange at Cadiz on London; and the master may be made, is was ordered by J. P. at Tangiers, to deliver the cargo at (by which it was that they be averred that the master was prevented from delivering the same to any of the in some way correspondents' factors, or agents of the charterer, at Tangiers or St. Lucas, authorised, agreeably to the bills of lading) and did deliver it at Cadiz to B. P. the agent or appoint of the defendant in that behalf, according to the charter-party. The master, ed by the who had not received the freight from B. P. on delivery of the cargo to him, freighters to now claimed it from the charterer in an action of covenant upon the charter-party. receive the It was contended, that the plaintiff had not any right to deliver to the goods. In defendant's agent there, he being a stranger to the bill of lading. *Sed Per* default of *Cur.* He may be looked upon either as virtually the appointee of J. P. and being so ap in that way he takes under the bill of lading as *his assigns*; or if not, J. P. pointed or must be considered as refusing to accept, or to make an appointment under the the goods bill of lading; and then in default of his having appointed any assign, the must be de plaintiff could not do otherwise than deliver to the agent of the defendant him- delivered to self, the original proprietor. For these reasons, we think the defence is not the freight made out, and that the plaintiff is entitled to judgment. or himself,

(1 c) *As relates to the manner and mode of delivery.*

The manner of delivering the goods, and consequently the period at which the responsibility of the master and owners will cease, depend (in the absence of [357] an express stipulation to that effect) upon the custom and usage of particular places and trade; *vide ante*, p. 150; 5 T. R. 389. 397; Peake. N. P. C. 150; 4 T. R. 260; 2 Esp. 693; Abbott on Shipping, 260. The mode of delivery, like that of loading,

* If the bringing of an entire cargo to the port of delivery be made an express condition precedent by the contract, nothing less than the full performance of it by bringing the whole cargo there will entitle the master to his freight; nor does it matter whether the sum made payable by the contract for the carriage of the goods be expressly reserved *eo nomine* as freight or not, as appears by the following case: The covenant was with the master of a ship, that if he would bring his freight to such a port, the merchant would pay him a certain sum; and the declaration averred that part of the goods was taken by pirates, and the residue brought to the port appointed, and there unladen; upon which a question arose whether the merchant should pay the money agreed for, since all the goods were not brought to the port of delivery; and the Court were of opinion, that he was not bound to pay the money, because the agreement of the master was not performed; 1 Brownl. 21; 7 T. R. 386; 8 East. 445. In this case the word "if" constituted an express condition precedent, and no question appears to have arisen as to the master's right to part of the freight, upon a new and implied contract. However, in case of freight and passage money, where a certain sum is covenanted to be paid per ton, or per man, so that it can be easily ascertained what proportion of the reward agreed for is payable, though the party be not entitled to the whole of it, on account of his not having completely and exactly performed the contract, the Court are always willing to consider his partial default in performance not a bar to his whole claim, but only a matter in reduction of its amount: 1 Lev. 16. If the delivery of a complete cargo be a condition precedent to the recovery of any freight, no doubt the defendant is entitled to require the strictest performance of it. But whether it be a condition precedent, depends not on any formal arrangement of the words, but on the reason and sense of the thing, as it is to be collected from the whole contract; whether, of two things reciprocally stipulated to be done, the performance of the one does, in sense and reason, depend upon the other. The doctrine was lately applied to a claim of freight due upon a charter-party of affreightment, where there was a short delivery. In that case, a ship of about 400 tons burden, was freighted to go to St. Petersburg, and to bring home a complete cargo of hemp and iron, and to deliver the same on being paid freight at so much per ton on each commodity. Lord Ellenborough, C. J. observed, that if the owners were not entitled to freight for any portion of goods he might bring home short of a complete cargo, and it should appear by any subsequent admeasurement of the vessel, even after the delivery of the goods, that there was wanting the least fraction of a complete cargo; if the ship had been supposed to measure 400 tons, and a cargo adopted to that proportion had been loaded, but it turned out that she measured 10 to 20 tons more, the owner would altogether be defeated of his remedy for the whole freight; 10 East. 308, and 309. must, if not directed by the deed, be regulated by the practice of the place.*

In the course of the argument of the case just cited, Lord Ellenborough, C. J. observed, that he did not see how the receipt of the goods changed the situation or the parties, because they were the defendant's own goods; and unless freight were due upon them by the contract, the defendant was entitled to have them, being his own, without any consideration. His taking possession of them was only taking that peaceably, for which, if wrongfully withheld, he might maintain trover. But, on the other hand, the plaintiff's agreement was a strong one; that that of the defendant would go this length—that if the

[358] (b) *With reference to particular covenants, and consequent duties on the part of the hirer of the vessel.**

1. *To procure a licence.*

2. JOHNSON v. GREAVES. E. T. 1810. C. P. 2 Taunt. 356.

Per Cur. Where the charter-party is not to go to any particular port, but generally to proceed to any port or ports in a particular island or sea, without any distinction of such ports as are in a state of hostility to this country or not, the true construction of a covenant in such a charter-party to procure a licence for the ship (though it be not said a sufficient licence) is, that the licence shall be sufficient for such port or ports as the ship shall go to, and shall require a licence.

2. DEFFLIS v. PARRY. H. T. 1802. C. P. 3 B. & P. 3.

This was an action on a policy of insurance upon goods on board the *Friendlyke*, lost or not lost, at and from Rotterdam to London, against all risks, British captures included. The declaration, after setting out the policy, and making the usual averments, alleged that the *Friendlyke*, with the said goods on board, was captured on the high seas by the French, and that at the time of the sailing of the said vessel with the said goods on board, upon the voyage aforesaid, the plaintiff had the leave and licence of our lord the king, for bringing the said goods and merchandizes, in the said vessel, from Rotterdam aforesaid to London aforesaid. The defendant pleaded the general issue. At the trial it appeared, that Messrs. B. & S. merchants of London, obtained a licence from the crown in the following terms, "George the Third, &c. To all commanders of our ships of war and privateers, and all others whom it may concern greeting. Our will and pleasure is, that you permit Messrs. B. & S. or their agents, or the bearer of their bills of lading, on board six ships, the names of which they are unable to set forth, the same being American, cargo wanted a single ton only of being a complete cargo, it would be a defence to an action on the charter-party for the freight; 10 East. 301.

His lordship, indeed, intimated, that the covenant on the part of the plaintiff being, that the ship should proceed with all convenient speed to St. Petersburg, and there load a complete cargo, that would not be satisfied by the plaintiff's bringing part of the cargo at one time, and then going back and bringing the remainder of it. But in all cases of conditions precedent, the thing to be done is entire and indivisible; and the delivery of a cargo of goods is not one entire thing, but in its nature divisible; therefore, the completion of the cargo is not a condition precedent within those cases; 10 East. 301. 303. 305. In the case here put, of procuring different parts of the cargo in different voyages; the proper remedy against the master or owner of the ship would be by action on the charter-party for damages, if he have contracted to procure a complete cargo in one voyage, the delivery of such cargo not being a condition precedent.

If the bills of lading be in the usual form, without any special provisions, and the issue also be general on the fact of a right and true delivery of the cargo, according to the bills of lading, that is to be taken in a narrow and restrained sense, and is satisfied by the delivery of the number of chests or packages shipped on board the vessel. If the contents of any of them turn out to have been damaged by the negligent stowing, or subsequent want of care, by the master or crew, or proper ventilation, the freighter has a cross-action to recover damages; but it is no answer to an action on the charter-party for his freight; 12 East. 331. If the like good condition of a cargo, when delivered as when shipped, were a condition precedent to the right to recover freight, and the goods were damaged to the extent only of a farthing, the master would not be entitled to recover any freight, which never could be the intention of the contracting parties; 12 East. 394. 395. However, if there is a special provision in the bills of lading for the care, or against the negligence of the master and crew, and the defendant by his plea admits that all the goods were delivered, but says that the plaintiff did not make a right and true delivery of the whole cargo agreeably to the bills of lading, an issue on such a plea might let the defendant into proof of negligence; 12 East. 393; see Lawes on Charter-parties, 88. &c.

* It has been already shown, how far it is incumbent on the master to procure the necessary licences and clearances for the voyage, in the absence of any express stipulation or covenant for that purpose in the contract of affreightment; see also *Roccus*. not. 85; French Ordinance, liv. 3. tit. 3. fret. art. 9; 3 M. & S. 117; 1 Taunt. 227.

† Upon the same principle of equity, in *Havelock v. Geddes*, (10 East. 555.) where the merchant had conditioned with the owner, that an extra number of men should be taken, at his expence, to work the ship, but that he, the merchant, should not be called upon to pay them, until the ship's discharge on return from the voyage; the ship being accidentally burnt in the West Indies, the Court held the merchant liable.

Prussian, or belonging to any of the Hanse towns, to import, without molestation, from Rotterdam, Amsterdam, and Dort, to the port of London, such quantity of flax, flax-seeds, clover and other seeds, madders, &c., being British or neutral property, as may be specified in their bill of lading, provided the same shall be shipped as aforesaid, this licence to remain in force for the space of six months from the date thereof, and no longer. Provided also, that any person who shall claim the benefit of the licence hereby granted, shall take and have the same, upon condition, that if any question arise in any of our courts of admiralty, or elsewhere, whether such person or persons hath or have in all points conformed thereto, in all cases whatsoever, the proof shall lie upon the person or persons using this our licence, or claiming the benefit thereof. Given at our court of St. James's, the 21st day of February, 1801, in the 41st year of our reign." That, on the 20th of February, 1801, the plaintiff, having been recommended by Messrs. B. and S. to Messrs J. S. and Son, of Rotterdam, wrote to the latter, directing them to purchase some casks of madder; that J. S. and Sons accordingly did purchase 80 casks of madder, the goods insured, and on the 27th of March following, shipped them on board the *Friendlyke*, the captain of which vessel signed three bills of lading, whereby he promised to deliver the 80 casks of madder to the shippers, or their order; that on the same day, Messrs. J. S. and Son wrote a letter to the plaintiff, inclosing the invoice and one of the above bills of lading, indorsed in blank, and apprising him that they had so shipped the goods, and that they should draw for the amount; that on the 24th of April following, one bill of lading for the whole cargo of the ship *Friendlyke* was signed by the captain, and endorsed Messrs. J. S. and Son to Messrs. B. and S. of London, to whom the captain was addressed with orders, with directions to follow their orders; that Messrs. J. S. and Son drew bills of exchange upon the plaintiffs for the amount of the goods insured, and remitted them to Messrs. B. and S. which bills the plaintiff afterwards accepted; and that Messrs. B. and S. according to the course of trade between themselves and Messrs. J. S. and Son, would, under the general bill of lading of the whole cargo, have withholden the goods for which the plaintiff had not duly accepted the bills drawn by Messrs. J. S. and Son, to answer the amount of the goods. The jury found a verdict for the plaintiff, but liberty was reserved to the defendant to move to have a nonsuit entered. Accordingly, a motion was now made for a rule nisi, contending that the goods insured were not protected by the letter of licence, since the plaintiff, upon whose account the goods were ordered, was not to be considered as the agent of Messrs. B. and S. or as the holder of their bill of lading; that the bill of lading endorsed by the shippers, and sent to the plaintiff, vested in the latter a complete authority to demand the goods; and that the general bill of lading sent to B. and S. which was of a subsequent date to that sent to the plaintiff, could convey no right to B. and S. to withhold the goods from the plaintiff; and that as three bills of lading had been made out, according to the usual course, respecting the goods sent to the plaintiff, and only one general bill of lading for the whole cargo, it manifestly appeared, that the former were the regular bills of lading, whereas the latter was only a fictitious instrument, for the purpose of protecting the property of those who were not within the terms of the licence. Lord Alvanley, C. J., was of opinion, that it was the intention of government to authorize this sort of importation; he said they intended that any goods coming to this country under B. and S.'s bill of lading, and, with their permission, should be protected by the licence; and it was within the knowledge of government this use was made of such licences. The words of the licence were general, and if the contrary had been the intention, it would have been expressed. With this general bill of lading on board, no Custom-house officer would have dared to stop the goods. The court will not construe the acts of government strictly against the merchant. A fair use has been made of the licence, the terms of which warranted the transaction.

3. FEIZE v. THOMPSON. H. T. 1808. C. P. 1 Taunt 121.

A certain licence permitted T. B. and Sons to import on board six ships, no:

[359]
lading, and
goods beim
ported on
board one
of the six
ships, on
account of
B. C. and
D. to whom
several bills
of lading
are sent for
their respec
tive goods,
and one ge
neral bill of
lading for
the whole
cargo be
sent to A.,
the whole
cargo will
be protec
ted.

[360]

But it is otherwise, if the licence be expressly granted for the exportation of goods, as being the property of the persons to whom it is granted.

named, from certain ports, such goods, being the property of the said T. B. and Sons, as might be specified in their bills of lading, with the usual clause as to the proof of the licence, and in the margin was written, "T. B. and Sons, licenced to import." B. who was the ship's broker, proved that licences for all persons on whose behalf he acted, were constantly taken out in his own name in the same form; that he appropriated the ship in question as one of the six for which the licence had been obtained, and the plaintiff repaid him a proportion of the expence of it. It does not appear how the bills of lading were drawn or endorsed; but the question was, if the transaction was legalized.—Mansfield, C. J. said that he had no doubt of the honesty of the transaction, the truth of the broker's testimony, the innocence of the plaintiff, or the prevalence of the practice; but a lawyer, or a man of business, looking at the licence, would say, it was nothing else than a licence to B. Heath, J. observed, that the course of the Secretary of State's office had been altered since 1802, before which time the terms of the licences granted were very general, though they were now more confined, whence it appears that some inconvenience had been found in the former practice. Chambre, J. said, the licence was most explicit notice to those who obtained it, that the proof of this conforming tort lay upon them, and that they must conform in every respect; and that after that they could not profess ignorance; and the rule to set aside the nonsuit was discharged. But on a subsequent day, a motion was made for a new trial upon an affidavit of B. the broker, which suggested that he had, according to the usual practice of trade, himself received a general bill of lading, comprehending the goods in question, which he had mislaid, and that he did not doubt of obtaining a duplicate from abroad. The court, seeing that it was merely a question for costs, and being informed that other actions were depending upon the same question, in which the fact of the bill of lading would appear, directed the judgment to be stayed till those causes should be determined, the plaintiff undertaking to try them as soon as he should obtain the general bill of lading. The rule was accordingly enlarged.

4. JOHNSON. v. GREAVES. E. T. 1810. C. P. 2 Taunt. 344.

[361]
It would seem that a license to bring home a return cargo applies to a cargo purchased with the proceeds of the outward cargo.

One question, which accidentally arose in this case was, whether a cargo being purchased in part only, or not at all, with the proceeds of the outward cargo, is within a licence to bring back a return cargo. The issue was intended to try that point, but the case did not ultimately turn upon it, although there was much argument on the meaning of a cargo of this sort. Mansfield, C. J. seems to have been inclined to think, that such a cargo necessarily implied goods purchased with the proceeds of the outward cargo; for, (said he,) "to be sure, the words mean nothing if they cover any cargo, not being one bought with the produce of the goods sent out from this country:" but it was not (as he observed) then necessary to decide that question. The licence recited, that the defendants were desirous of obtaining the royal licence and protection for the British ship Ben Lomond, (which they intended to load at Portsmouth with a cargo of British manufacture and East India produce, to convey and exchange the same to the island of St. Domingo,) and the importation (in return for the cargo so to be exported) of specie, bullion, coffee, &c., or any other articles the growth or produce of the said island; and contained the following direction: "that the property of the defendant Greaves, and other British merchants, so to be exported (to any ports or places in St. Domingo, which should not be under the immediate dominion of his majesty's enemies), and also the returns of the said cargo (consisting of articles of the growth and produce of the said island, except copper, to be brought back in the same ship direct to some port of the united kingdom), should not be liable to condemnation as prize; and that if the said property should be seized or detained, either on the outward or homeward-bound voyage, as prize to any of his majesty's ships of war or privateers, and brought to adjudication in any of the Courts of Admiralty or Vice-Admiralty, it should be forthwith released, upon a claim being exhibited, and sufficient bail being given to answer the adjudication; but that it should lie upon the defendant, or his agents, to make

due proof of the circumstances therein stated, and that every thing was had and done accordingly to the true intent and meaning of the licence." The vessel having received on board, at Portsmouth, a cargo consisting chiefly of coffee-bagging, of no great value, sailed to Cape Francois, which was then under the dominion of Christophe. On her arrival the master received from the defendant's agents their instructions to proceed to Gonaives, another port of the island under the same dominion, where he discharged his outward cargo, and received on board another, consisting of coffee and cotton, the produce of the island, in different parcels. On the 29th of March, 1808, the ship sailed from Gonaives on her homeward voyage, and on the 30th she was detained by a frigate, the commander of which conceiving, on inspection of the papers, that the greater part of the cargo on board had not been shipped in return for the outward cargo, within the scope of the license, sent the ship and cargo into Jamaica. Upon her arrival there on the 11th of April following, he restored to the master 73 bags of coffee, consigned to the defendants, which appeared to be purchased with the produce of goods directly exported from London, and labelled the remainder of the cargo as prize in the Court of Vice-Admiralty in Jamaica, which condemned it as enemy's property. But the ports of Cape Francois and Gonaives not being, at the time of this adventure, in the power of the enemies of Great Britain, upon appeal brought in England, the sentence of the Vice-Admiralty Court in Jamaica was reversed, upon payment, by the owners, of the captor's costs.

5. *VAN OMERON v. DOWICK*. H. T. 1809. K. B. 2 Campb. N. P. C. 44.

In this case, which was an action against the owners of a ship, on the bill of lading, for a wrongful sail of the goods by the captain, an objection was taken, that the goods, which were cutlasses, were contraband articles of war, the exportation of which were prohibited without a licence from the king, and that no such licence was produced. But *Lord Ellenborough* said: if it were proved that the cutlasses were entered at the Custom-house, he would presume *omnia rite acta*. No evidence of this sort could be found; but it turned out, that by the stat. 33 Geo. 3. c. 2. the king was only authorised to prohibit the exportation of implements of war by proclamation, and the defendant not being prepared with the Gazette containing the proclamation for this purpose, the plaintiff had a verdict.

But it will be presumed in all cases, that a covenant to procure a licence has been complied with, unless the contrary be proved.

2d. *To furnish a cargo.**

1. *SOAMES v. SOMERGAN*. H. T. 1824. K. B. 2. B. & C. 564; S. C. 4 D. & R. 74.

The charterers of a ship, called the *Grant*, for a voyage from C. to St. B. and thence to G. to take the homeward cargo, caused another ship called the *St. Patrick*, to be chartered on their account to go out in ballast, and bring

* *Beawes* thus accurately describes the nature of dead freight. If (he says) a ship be freighted to go to any place to load, and on arrival there the factor cannot, or will not, put any on board her, after the master has staid the days agreed on by the charter-party, and made his regular protests, he shall be paid, empty or full; *Beawes*. 136. 139. If no cargo be loaded, the compensation payable to the owner or captain on this account is called dead freight. In opposition to freight due for the carriage of goods loaded on board the ship. The former is, therefore, rather a compensation in lieu of freight, than freight itself. It is, indeed, a particular name given for such damages as are recoverable by the captain or owner of the ship against the freighter or merchant for the loss of the freight, which would otherwise have become payable by the charter-party, in consequence of his not putting it in the power of the captain, or owner, to earn such freight, by not loading a cargo according to the terms of his contract. These damages are, in general, quite unliquidated, and to be ascertained by a jury or an arbitrator; but sometimes a particular sum is stipulated, in the charter-party, to be paid by the merchant or freighter, in case of his not thinking fit, or being unable to load a cargo; in which case the sum so stipulated is also called dead freight; see *Lawes on Charter-parties*, p. 117.

The freighter must furnish a cargo in compliance with his contract.

According to *Molloy*, if part of the loading be on board, but by misfortune the merchant have not his full loading by the stipulated time, the master is at liberty to contract with another merchant, and shall have damages for the time that the goods were on board after the time limited; for the agreement to load being in the nature of a condition precedent, a failure in performance will determine the contract, unless afterwards affirmed by consent. And though it be not prudent for the master to depart from the contract in every case

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home a cargo from G., with a proviso, that in the event of the non-arrival of the first mentioned ship at G., then the said charter-party should be void. This was an action on the charter-party of affreightment made between the plaintiffs, owners of the St. Patrick, and the defendants. The judge before whom the trial took place, told the jury, that, in his opinion, the arrival of the Grant mentioned in the proviso, meant an arrival in time for the object of the charter of the St. Patrick, and that unless they thought that the arrival of the Grant had been improperly prevented by the charterers, they should find a verdict for the defendants. The jury having found a verdict for the defendants, a rule nisi was obtained for a new trial, on the grounds, that the proviso in the charter of the St. Patrick was satisfied by the arrival of the Grant at any time during her then voyage; and also, that it ought to have been presumed that she had been delayed improperly by the defendants. *Per Curiam*. This case turns chiefly, if not entirely, upon the meaning of the term *non-arrival*. It may have an indefinite meaning; then it would be a mere wagering bargain between the parties; but it may also mean, non-arrival within such time as may answer the purposes of the St. Patrick's voyage. If the term *non-arrival* is to be construed indefinitely, it would be totally unconnected with the purposes of the charter-party on which this action is brought, and there could have been no reason for inserting it. But, in all probability, the parties contemplated such an arrival of the Grant as would be subservient to the purposes of the freighters of the St. Patrick, and in default of such arrival this charter-party might be altogether useless to them. Let the rule be therefore discharged.

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2. MOORSON V. PAGE. M. T. 1814. K. B. 4 Campb. N. C. 103.

In this case the freighter of a vessel covenanted by charter-party to provide for the ship a full and complete cargo, consisting of copper, tallow, and hides, or other goods, on which separate rates of freight were paid. It appeared that the defendant had provided for the ship a quantity of tallow, and as many hides as she chose to take in, but that he refused to let her have any copper. It was in consequence necessary for her to keep in her ballast, the place of which might have been supplied by the copper, and the amount of the freight which she carried was less than if copper had been supplied. The plaintiff contended, that under the covenant to load the ship, the defendant was bound to furnish her with a properly assorted cargo, so that she might be entirely filled with goods, where it happens that the agreement as to the lading is not strictly performed, and it is seldom or ever done if any part of the cargo be on board; yet it is of the highest importance that masters of ships should be free; for otherwise, by the lading of a single cask or bale, the voyage might be defeated. On the other hand, if the vessel will not hold all the merchandise, the merchant may discharge the master, and ship on board another vessel the remainder of his goods, and recover damages against the master or owner, upon the like reason as the former rule; Mol. b. 2. c. 4. s. 3.

If the cargo be fully laden, and the ship has broken ground, but the merchant resolves to unlade the goods, it is said, that by the law marine freight is due; Mol. b. 2. c. 4. s. 5. This must be taken to mean dead freight; and by the common law it is quite clear, that in such case an action lies for preventing the ship-owner from recovering his freight, according to the contract between the parties. But he cannot sue or declare for freight *eo nomine*; as that is only due in case the contract is carried into execution, by the conveyance and delivery of the goods. A special count should therefore be framed, in such case, according to the circumstances; see Lawes on Charter-parties. 120. 121. The law relative to dead freight will be examined *post*, tit. Freight.

* Which he must, within a reasonable time, depending on circumstances and the practice at the port of delivery (2 Campb. 488.); or if a time be specified within that period (2 Campb. 353; Holt. N. P. C. 35.), include the cargo at the port of destination, pursuant to the terms agreed upon; and if he do not, he will be liable to demurrage, if agreed for; and if there be no stipulation, he will be liable to an action for the improper delivery of the ship. Where a ship was let to freight by charter-party from plaintiff to defendant, and the deed contained a clause, whereby it was covenanted and agreed by and between the said parties, "that 40 days shall be allowed for unloading and loading again," &c., it was held, to raise an implied covenant, on the part of the freighter, not to detain the ship for loading and unloading, &c. beyond 40 days; and that if the freighter detained her for any longer time, he would be liable in the covenant; see 12 East. 179.

† Therefore, if it be requisite to prevent this, a clause in the charter-party should be inserted to this effect; see Abbott on Shipping, 188.

on which freight would be due, and that he was therefore liable in damages for a sum equal to the freight, which would have been earned had the copper been put on board. Per Lord Ellenborough. The parties very likely intended that copper should necessarily form a part of her cargo; but they have not said so. The covenant leaves a latitude to the freighter to furnish a cargo of "copper, tallow, hides, or other goods." Therefore, if the ship had as large a quantity of tallow and hides as she could take on board, I think the covenant has been performed.

3. *HYDE V. WILLIS*, H. T. 1812. N. P. 3 Campb. 202.

The offer of a cargo at less freight than is mentioned in the charter party, is, however, tantamount to no offer.

A freighter covenanted to load on board a ship belonging to the plaintiff a full cargo of sugar, and to pay freight after a specified rate. The freighter's agent refused to provide the stipulated cargo, unless the captain would sign bills of lading for the same at a reduced rate of freight, which was declined. On an action for dead freight, Lord Ellenborough held, that the captain was justified in refusing to comply with the requisition of the defendant's agent; as, if he had signed the bills, he would have been bound to deliver the cargo on receiving freight at such reduced rate, and that, though the plaintiff would have been entitled to a lien on the goods on the charter-party, the defendant's agent was not authorised in demanding new terms from the captain. Verdict for plaintiff.

4. *SJOERDS V. LUSCOMBE*, M. T. 1812. K. B. 16 East. 301.

In this case the defendant covenanted to procure a loading, and send it alongside the ship in the usual form. The defendant's counsel put in a paper signed by the plaintiff (the captain, who had entered into the charter-party,) to the following effect: "I do acknowledge that the agents of Luscombe (the freighter) offered the cargo, and the sole reason why the same has not been taken on board is, the refusal of the custom-house officers to grant a permit to take the goods on board, which is still continued. This refusal was understood to have been on account of the American embargo law; notwithstanding which, the jury found a verdict for the plaintiff. A rule to show cause why there should not be a new trial, was granted, on the suspicion that it was an artificial letter; but that being a question for the jury, who had decided the letter to be genuine, that question fell to the ground, and the rule was discharged."

So the offer of a cargo without a permit, if it could not be taken on board without one, is not sufficient.

5. *SJOERDS V. LUSCOMBE*, M. T. 1812. K. B. 16 East. 201.

And in the same case it was decided, that an averment that the freighter offered to send a cargo alongside, but that the master refused to receive it there, and discharged him from sending it alongside, was proved by an acknowledgment of the master, that the freighter, though willing to send, was prevented by an embargo.

The master of a ship covenanted in the same charter-party as mentioned in the preceding case, to go to a certain part of America, and receive a loading from the freighter alongside the ship, and bring home the same, with an exception of the restraints of rulers, &c. The freighter covenanted absolutely to provide the loading without any such exception. It appeared that an embargo had been imposed in America. In an action brought against the freighter for non-performance of his covenant, the defendant pleaded that he did provide a cargo, and was ready and willing, and offered to send it alongside the ship, but that the plaintiff refused to receive it there, and discharged the defendant from sending it alongside. The plaintiff replied, that the defendant did not provide the loading, and offer to send it alongside in manner and form. To support the defendant's plea, a paper was put in, in evidence, purporting to be the master's written acknowledgement of the defendant having offered to load the cargo on board, on his (the master's) being ready to take it, and that the embargo had been the sole reason for its not having been taken on board. A verdict had been found for the plaintiff. A rule being obtained for a new trial, the court in discharging it said: if the plaintiff had exhibited his case properly on the record, there could have been no doubt. Our only embarrassment at present is upon the mode upon which this record is shaped. It is averred in answer to the defendant's plea (that the defendant offered to send the cargo alongside the ship, but that the plaintiff refused to receive it from the defendant alongside the ship, and discharged the defendant from sending it alongside,) that the defendant did not provide the loading and offer to send it alongside in manner and form. But the answer is, that the paper does not sustain that allegation, and therefore does not sustain the terms of the is-

If A. on his part covenant with B. to carry a cargo to N., and abandon the charter-party, by the terms of which it is clear the defendant is that having liable to this action. Rule discharged.

6. *STORER V. GORDON*. M. T. 1814. K. B. 3 M. & S. 308. S. P. *OLSHEN V. DRUMMOND*. T. T. 1785. K. B. 2 Chit. Rep. 705.

By a charter-party between the ship-owner and freighter of a vessel, the ship-owner covenanted to proceed from L. to Naples, and there make a right go, and B. and true delivery of the outward cargo, and having so done, receive on board on his part a return cargo, restraint of princes &c. excepted; and the freighters covenanted with A. that he would provide and ship a return cargo at N., B. is bound to provide one the ship being in readiness to receive it, though A. has not delivered the outward cargo.

And this decision has been since adhered to.

The court expressed themselves of opinion, that the right and true delivery of the outward cargo was not a condition precedent, and said: the covenant on the part of the plaintiff, as far as is material to this question, is, that the ship should go to N. and there make a right and true delivery of her outward cargo, and that having so done she should take and receive a homeward cargo; and the argument is, that the words "having so done" would have excused the plaintiff from taking on board a homeward cargo if he had not first delivered his outward cargo; and that whatever would have excused the plaintiff from receiving, would also excuse the defendants from loading. It does not appear to us, however, that these words would have been any excuse to the plaintiff, the words seeming rather intended to mark the time when the plaintiff's obligation to receive a homeward cargo should attach, viz. when his ship from being clear of one cargo should be in a condition to receive another. But admitting that the plaintiff might have been discharged from his obligation to receive, it by no means follows that the words afford a defence to the defendant. The plaintiff might wish to reserve an option to himself, and might therefore qualify his covenant; but he might not choose to give any option to the defendant, and might insist from him upon an unconditional and unqualified covenant. For these reasons the defendant cannot plead as he has done.

7. *FOTHERGILL V. WALTON*. M. T. 1818. C. P. 2 B. Moore. 630; S. C. 8 Taunt. 576.

Covenant on a charter-party. The plaintiff as owner, after covenanting for the tightness and sufficient manning of the ship, engaged that he should receive on board at H. where she then lay, six pipes of brandy, and should proceed therewith to the island of T. or S. as the defendants or their agents might require. That the master should there take in a complete cargo of green fruit, or whatever the defendants or their agents might think proper to send on board; and being so loaded, should depart to, &c. The declaration averred performance generally on the part of the plaintiff, and alleged that the vessel sailed as agreed to T. and that the plaintiff was ready, &c. to perform all things, &c. yet the defendant did not, nor would, &c. General demurrer and rejoinder. It was contended for the defendants, that such a general averment of performance was insufficient, as the plaintiff's neglect to ship the brandy, according to his covenant, had operated to prevent the defendants furnishing the fruit, which was to be obtained by bartering the cargo they were to receive from the plaintiff.

[367] *Per Cur.* The point on which this case is to be decided is, whether the words of the charter-party have rendered these covenants mutually dependent on each other, and therefore imposed on the plaintiff the necessity of performing his part before he can require the defendants to fulfill their covenants; or

whether they are left independent of each other, so that the plaintiff may compel performance on the part of the defendants, who cannot set up in defence the non-performance, or insufficient performance, by the plaintiff, but must resort to their remedy for damages consequent on such negligence of the plaintiff. The rule adhered to in deciding on the nature of separate or dependant covenants, was laid down in the case of *Bone v Eyre*. 1 H. Bl. 273. n. that where they comprehend the whole consideration, they are mutual, and dependant one on the other, but that they are separate whenever the negligence on the part of either can be satisfied in damages. Now the defendants covenanted to provide a full cargo of fruit at T. whereas the plaintiff was to load only six pipes of brandy, which could not be considered as extending to the whole consideration on both sides. Had the shipping of the brandy been a precedent covenant, the exact quantity must have been furnished. Judgment for the plaintiff.

8. *DEFFELL v. BROCKLEBANK*. E. T. 1817. Ex. 4. Price 36.

Error from a judgment of the Court of K. B. By the terms of a charter-party it was agreed by the defendant in error, owner of a certain vessel, that the said ship should sail from the port where she lay to M. and on arrival there should receive and take on board from the agents of the plaintiff in error, a certain quantity of produce, and that, being so loaded, she "should set sail with the convoy that should depart from Jamaica for England, in the month of June next, provided the ship arrived out and was ready to load" a certain time before such convoy should sail. The plaintiff in error, as freighter, covenanted in consideration thereof, to supply a full cargo of produce as stipulated by the instrument. The declaration averred that the ship sailed to M. and was ready to receive, &c. and that notice was given, &c. and that the master received on board such a cargo as the agents of the plaintiff in error thought proper to provide. Breach, that the cargo supplied for the defendant in error, was much less than the quantity covenanted for. For the plaintiff in error it was urged, that the terms of the deed imposed on the defendant in error a necessity of performing his part of the charter-party before he could call for performance on the part of the defendant. But the Court held that the covenants were independent, and that whatever remedy the plaintiff in error might have on the covenant to sail at a particular period, he was still liable on his general covenant to provide a return cargo.—Judgment for defendant.

9. *BARKER v. HODGSON*. M. T. 1814. K. B. 3 M. & S. 267.

To covenant by master against freighter of vessel for not sending a cargo alongside at Gibraltar; defendant pleaded, that a pestilent and infectious disorder prevailed there, and therefore all intercourse was prohibited by the law of the place, and became impracticable, without imminent danger to the persons concerned of contracting and communicating the same, and defendant was prevented from sending alongside during all that time, of which plaintiff had notice, and thereupon departed with his ship on his return. Replication, that defendant might have sent the cargo alongside before all intercourse became unlawful or impracticable, but refused; and thereupon plaintiff departed with his ship by the consent of defendant's agent. Demurrer and joinder. The question which arose upon these pleadings was, whether the matter alleged in the plea was sufficient to excuse the defendant for the non-performance of his covenant.

Per Cur. If, indeed, the performance of this covenant had been rendered unlawful by the government of this country, the contract would have been dissolved on both sides; and the defendant, inasmuch as he had been thus compelled to abandon his contract, would have been excused for the non-performance of it, and not liable to damages. But if, in consequence of events which happen at a foreign port, the freighter is prevented from furnishing a loading there which he has contracted to furnish, the contract is neither dissolved, nor is he excused for not performing it, but must answer in damages.—Judgment for the plaintiff. See 1 Roll. Abr. 450. pl. 10; 2 Vern. 212; 3 B. & P. 295. n. a.

So it is not sufficient to excuse the freighter from the performance of his covenant, to provide a cargo, that a proviso in the charter party that the ship should arrive and be ready to load six days before the sailing of convoy has not been complied with. So it has been held, that a freighter who covenants generally to load a cargo, and is prevented so doing by the prevalence of an infectious disorder, is liable on his covenant. But where a ship was freighted to go in ballast to Jamaica, and bring home a cargo thence, and the freighter under

took to provide a full cargo for her in time for the July convoy. She arrived and was ready by the 25th of June, it was held that as she did not arrive out till after that period, the freighter was entirely discharged from his contract to furnish a cargo.

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A freighter who covenants to load a return cargo, must, however, if he objects to the ship's delay in proceeding to take it on board, make the objection before he loads the cargo, and within a reasonable time, and must not by any act take to the ship.

The performance of this covenant is, however, in all cases subject to the custom of the country from which the freighter furnishes the cargo.

10. SHADFORTH v. HIGGIN. E. T. 1813. K. B. 3 Campb. N. P. C. 385.

The plaintiff, as owner of a certain vessel, entered into an agreement with the defendant whereby it was stipulated on the part of the former, that the ship should sail in ballast to J. and there receive a full and complete cargo, &c.; and on the freighters behalf, that he would at such place provide a cargo to be taken on board, in time for the July convoy; "*provided* the ship arrived out and was ready by the 25th of June." The vessel did not arrive at J. till the 3d of July, when no cargo was furnished by the defendant, in consequence of which this action was brought on the agreement; when Lord Ellenborough held, that the arrival of the ship by the 25th June was a condition precedent to the obligation on the defendant to supply a cargo; and he observed, that many circumstances might concur to render the arrival of the ship at the stipulated time material to the defendant's interest, in case it was necessary to load goods by that day, and which were consequently sent by another medium; besides, it would be impossible to draw distinctions as to a day.—Plaintiff nonsuited.

11. OLHSEN v. DRUMMOND. T. T. 1785. K. B. 2 Chit. Rep. 705.

The plaintiff as owner of a certain ship lying at P. covenanted with the defendant, who took the same to freight that the said vessel should sail to T. and having unloaded her cargo there should directly proceed to D. or either of several ports mentioned, and there take on board a complete cargo of goods specified in the instrument, and should therewith proceed with all due expedition to O. and there unload, &c., and on such delivery end her voyage; then followed provisions as to the time which the vessel should be suffered to stay at the respective ports. In consideration of which covenants, the defendant agreed that he or his agents should, within the time limited by the charter-party for that purpose, at D. or either of the ports mentioned at the option of the freighter or his agents, load a full and complete cargo for the homeward voyage, as before mentioned, and that the freighter, or his agents, should, within a certain time after receiving notice of the ship's arrival at D., determine at which of the ports mentioned the ship should take in her homeward cargo. Averment, that the ship sailed from P. and arrived at D., and that due notice of such her arrival was given to the freighter's agent there, and that such agent determined that the ship should load at D., and that afterwards the ship lay at D. during the whole time allowed for lay days and demurrage, and after the expiration of such time, was ready, &c., to receive from the freighter or his agent a full cargo, &c. which the agent well knew; but that the agent of the freighter did not, nor would, furnish a cargo, as, &c., within the time, &c. but neglected, &c. The defence made by the plea was, in substance, that the ship did not arrive at the different ports within the respective times limited in the deed. But the Court held, that the plea was no answer to the action, as the fact of the agent electing to load at D. was such a taking to the ship as would preclude the defendant from now objecting to the delay.

12. BENSON v. SCHNEIDER. H. T. 1817. C. P. 1 B. Moore. 21; S. C. 7 Taunt. 272. 337.

Assumpsit on a charter party, by which it was agreed, that the plaintiff's vessel should proceed to C. and there receive a cargo from the agents of the defendants, and sail with the same to D. or E. and thence, if required, to other ports mentioned in the instrument, and deliver the said cargo in payment of freight at a certain poundage for cotton wool, in round bales, and for square compressed bales at a lower rate. It was further provided that on the arrival of the vessel at C. the master should give notice thereof to the defendants' agents, and, on requisition from them in writing, should sail to O. and there load a full cargo of cotton wool or other goods above specified, on the conditions stipulated, if the ship had loaded at C. except that a higher rate of poundage was to be allowed if the vessel sailed to the latter place. The allegations were, that on the arrival of the ship at C. the master had orders to proceed to O., and having sailed pursuant to such command, was ready, &c. according to the terms, &c.; and the plaintiff assigned for breaches, that nei-

ther the defendants nor their agents would provide a full and complete, &c.; but dispatched the ship with a small and insufficient, &c., and that part of the freight remained unpaid, contrary, &c. It was proved that a practice existed at O. that the owner of cotton wool should convey the same to the shore, compressed at his own expense, and that the wool was then recompressed at the expense of the shipper by machines placed on the shore. The captain having received a certain quantity of goods, refused to ship any more unless they were recompressed according to the custom mentioned. The above action was brought for damages incurred by the neglect of the defendants to supply a full cargo in the terms of the charter-party. The plaintiff had a verdict; and on a motion for a new trial, it was holden, that the defendants having engaged to provide a full cargo at O. were bound to supply the same at all events, subject to the custom which might prevail at O.—Rule refused.

13. *SJOERDS v. LUSCOMBE*. M. T. 1812. K. B. 16 East. 201.

In this case it appeared that there was an exception in the master of a ship's covenant in a charter party, to go to a certain port, and receive a loading from the freighter, &c. viz. "of the restraints of princes and rulers, &c." but that no such exception existed in the freighter's covenant to provide the loading. On the question arising in an action brought against the freighter on his covenant, whether an embargo in the port where the defendants covenant was to be performed, operated as a discharge to the defendant; the Court said that the restraint of the government would not operate as an excuse for the freighter, who was to load the goods on board at all events, even if by the law of the country it could not be done, but only for the ship owner, who covenanted with that exception.

(1) AS TO THE EXCEPTIONS USUALLY INTRODUCED INTO CHARTER-PARTIES LIMITING THE OWNER'S LIABILITY, AND HEREIN OF HIS GENERAL RESPONSIBILITY. The owner of a chartered vessel is liable to the same extent as common carriers are by law responsible, (unless under those circumstances in which, it has been already seen, the latter would be exempted from loss,) in the absence of any express exceptions in the charter party.*

(a) *Of the general liability incurred by the owner or master of a vessel entering into a charter-party.*

In the preceding section the positive and implied covenants of the charter-party have been considered: in the present section it is proposed to examine the exceptions which are expressed or implied with respect to the performance of those covenants, and the extent in which they are to be interpreted. In a previous part of this work, *ante*, p. 144, &c., the circumstances which either limit or excuse owners of vessels altogether have been pointed out. The necessity of special exceptions from all cases of extraordinary peril is too apparent to require any comment. Formerly carriers were allowed to protect themselves by special acceptances in such cases only; but in modern times they have been permitted to narrow and limit their general responsibility to almost any extent in all cases. The policy of permitting them to do so is a matter of great question. But it cannot be doubted that merchants may enter into any particular stipulations they think proper or convenient in their contracts; and as their responsibility and risk is great, they should be cautious that, by general words in their charter parties, they do not subject themselves to damages for accidents they cannot answer for, unless they intend to become insurers. The only means of preventing this is, by inserting exceptions in their contracts against liability for any losses or accidents which it is out of their power to foresee or guard against.† See *Lawes on Charter-parties*, 98.

* The clause of the charter-party, or bill of lading, which limits the liability of the master and owners by express exceptions, usually runs in the following terms: "And the said master agrees to make a right and true delivery of the said homeward cargo unto the said freighter or his order, according to the bills of lading, and so end the said homeward voyage, the act of God, and the king's enemies, the dangers and accidents of the seas, rivers, and navigation; the restraints and detentions of kings, princes, rulers, and republics, and all and every other unavoidable dangers and accidents excepted."

† Formerly one way of freighting was, that the merchant agreed with the master, for a sum certain, to convey his goods insured against all peril, in which case he was responsible if any detriment or loss happened; but that is now become obsolete; *Mol. b.* 2. c. 4. s. 2. See *Lawes on Charter-parties*, 99.

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It is, therefore, usual to insert an exception of the restraints of princes;

(b) *As to the exceptions generally introduced into charter-parties.*

1st. *As to restraints of princes, and of embargoes.*

1. *BLIGHT V. PAGE.* M. T. 1801; C. P. 3 B. & P. 295, n. recognized in *TONG V. HUBBARD.* id. 298; 2 Vern. 212.

This was an action upon a memorandum for charter, by which it was stipulated, on the part of the owners, that the ship should sail to Liebau, and there load from the factors of the defendant a full cargo of barley, and proceed thence to Berwick, and deliver the same on being paid freight at the rate of 8s. 6d. per quarter, with certain port charges and pilotage, (restraints of princes and rulers excepted,) one half of the freight to be paid on right delivery of the cargo, and the remainder in two months following; and the ship was to be allowed to remain on demurrage ten days over and above her running or lay days, at 3l. per diem. On her arrival in Liebau roads, the captain was informed by the factors of the defendant, that the Russian government had prohibited the exportation of barley, and that it was therefore out of their power to furnish the intended cargo. The captain, however, entered the port, and after continuing there forty-nine days, returned in ballast to Berwick. The action was brought to recover 459l. for freight, 27l. 18s. for charges, and 30l. for ten days' demurrage. It was argued for the defendant, that the exception of the restraints of princes and rulers was applicable both to owners and shippers; but *Lord Kenyon, C. J.* was decidedly against the defendant on this point, upon the above general principle of law, and therefore held that the plaintiff was entitled to recover the freight and charges; but, with respect to the demurrage, he held, that as it appeared that notice was given before the captain entered the port that the factor could not furnish a cargo, there was no pretence for making the plaintiff liable to that charge.

2. *NESBITT V. LUSHINGTON.* T. T. 1792, K. B. 4 T. R. 783.

Or other superior power; which has been, however, holden to be only applicable to the master and owners and not to excuse the shippers.

This was an action against certain underwriters of a policy of insurance. The declaration claimed compensation for a loss of corn, occasioned by the unlawful arrest, restraint, and detention of people to the plaintiffs unknown. The facts upon this part of the case were, that the ship being forced into Elly harbour in Ireland, and a great scarcity of corn happening to be there at that time, the people came on board in a tumultuous manner, took the government of the vessel from the captain and crew, weighed her anchor, by which she drove upon a reef of rocks, and would not leave her till they had compelled the captain to sell almost all the corn considerably below the invoice price. The word "people," it was contended at the bar, meant individuals of a nation, as opposed to magistrates or rulers.

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Mr. Justice Buller said: I cannot agree with the construction put at the bar upon the word "people;" it means the supreme power; the power of the country, whatever it may be. This appears clear from another part of the policy: for where the underwriters insure against the wrongful acts of individuals, they describe them by the names of "pirates, rogues, thieves:" then, having stated all the individual persons against whose acts they engage, they mention other risks, those occasioned by the acts of "kings, princes, and people, of what nation, condition, or quality soever." Those words, therefore, must apply to nations in their collective capacity.

3. *HADLEY V. CLARKE.* T. T. 1799. K. B. 8 T. R. 259.

It is however no defence to an action for not carrying the plaintiff's goods a certain voyage that in the course of the voyage an embargo was laid on her voyage.

In this case the plaintiff declared on a contract to carry his goods from Liverpool to Leghorn, the dangers of the seas only excepted; and stated that the ship, after arriving at Falmouth, abandoned the voyage, and returned with the goods to Liverpool, whereby the plaintiff not only lost the benefit of having his goods carried to Leghorn, but also of certain insurances he had effected on them for the voyage. The facts of the case appeared to be, that the vessel arrived at Falmouth the 30th of June, 1796, and during her stay there, waiting for convoy, an embargo was laid on all ships bound to Leghorn by an order in council of the 27th July, in that year; which embargo was directed to continue until further orders: the ship was thereby prevented from proceeding on her voyage. By another order in council of the 23d of August, 1796, the em-

embargo was taken off, so far as to permit vessels to proceed to the ports where the ship till they had taken their cargoes on board, and there re-land and warehouse the same, provided the master gave security that they should return to such ports under convoy. On the 7th of May, 1798, the plaintiff received notice from the defendants, that unless he would receive the goods back, pay the freight, and deliver up the bills of lading, or give a bond of indemnity, they would re-land and warehouse the goods. In June following he received a further notice from them of their intention to bring the cargo back to Liverpool, and re-land and warehouse the same there, agreeably to the second order in council, unless the plaintiff chose them to be landed at Falmouth till the middle of August, 1798, during all which time the embargo continued; when the defendants, without the plaintiff's consent, set sail with his goods to Liverpool, under the protection of the last mentioned order in council. On the ship's arrival at Liverpool, the plaintiff received his goods back, but without prejudice to his right of action. On the 24th of October, 1798, nearly two months afterwards, the embargo was wholly taken off by an order of his Majesty in council. *Lord Kenyon C. J.*, in giving his opinion on the case, observed, that both parties were innocent, but one of them must suffer; that no line had been, or he believed could be drawn, between an embargo for a longer or shorter period of time. It was admitted that an embargo being imposed during the war was a legal interruption of the voyage, and it would be attended with the most mischievous consequences if a temporary embargo were to put an end to the contract; for it would have the same effect as to all contracts for freight and wages.

4. *TOUTENG v. HUBBARD*. M. T. 1803. C. P. 3 B. & P. 291.

[373]

Assumpsit for freight. The plaintiffs, as owners of a vessel, and the defendant, a merchant, Dec. 1800, entered into an agreement for the charter of a Swedish vessel; and it was therein stipulated that the said ship, then lying in the river Thames, should with all convenient speed, sail to Y., and there receive from the agents of the defendants a complete cargo of fruit, and being so loaded should therewith proceed to, &c., and deliver the same on payment of freight by the defendant, his &c., &c., after the rate, &c. together with two-thirds of port charges, &c. as customary, restraint of princes and rulers during the said voyage always excepted, &c. The ship being under the necessity of putting back to the English port for stress of weather, was detained there by an embargo laid on Swedish vessels, till the following June, in consequence of which she was not ready to sail till the early part of July. The month of February being the latest period when fruit can be shipped in time for the season, the captain applied to the defendant, stating his readiness to proceed on the voyage, and requiring other letters of advice to his correspondents, in exchange for those which he then held. The defendant declined compliance with the captain's terms, and gave him notice that it would be useless to continue the voyage, and that he deemed the contract determined by the above detention. The plaintiffs had a verdict subject to the opinion of the court. The plaintiffs' counsel relied on their supposed exemption from the performance of that part of the contract arising from the usual exception in case of restraint by princes and rulers. *Per cur.* By the terms of contracts like the present, the owner is bound to accomplish the voyage. restraints of princes, &c. excepted, and it is incumbent on a freighter to provide a cargo homeward. But the case before us is peculiar in its circumstances, and therefore not within the application of the general rule. The parties in this transaction were subjects of states mutually hostile when the detention took place; and it is self-evident that the intentions of states, when laying an embargo at such a crisis, would be frustrated, if the subjects of each could carry on an uninterrupted commerce independent of the restriction imposed. The exception relied on is undoubtedly made for the benefit of the owner; who, in this instance, was a Swede, owner of a Swedish vessel manned by Swedes, against whom an express em-

* But the usual exception in the charter-party and bill of lading, against the restraint of princes and rulers, will have that effect.

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third state,
or the claim
be made by
a British
subject;

bargo existed; and who, as he must be identified with the state that claims his allegiance, would be empowered, if he were allowed to maintain this action, to contravene the acts of the British government. Had the delay, however, been effected through the act of a third state, it might perhaps have only created a suspension of the contract, on the hypothesis that the plaintiffs were not guilty of the default arising on the facts of this case. We refrain from expressing an opinion whether our judgment would equally apply to a question arising between British subjects; but we see no political objection to an insurance of one British subject by another against an embargo imposed by the government of his own state. See 2 Lord Raym. 840; 2 Salk. 444; 6 T. R. 413; *Eischoi v. Agar*, Park on Insurance, 109. n.; abridged post, tit. Insurance.

5. *ATKINSON v. RITCHIE*. H. T. 1809. K. B. 10 East. 530.

[374]
Nor to an
expected
and not ac-
tual res-
traint, al-
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The British ship *Adelphi* was chartered for a voyage from London to St. Petersburg, or as near there as she could safely get; there to load a complete cargo of hemp and of iron for ballast, and proceed therewith to Woolwich and London, and there deliver the same, on being paid freight, at certain rates per ton (restraint of princes and rulers during the said voyage always excepted; thirty running days to be allowed the merchant for loading. Under this contract the ship sailed to Cronstadt (the port of St. Petersburg), and there took in iron for ballast, and a certain quantity of hemp; and the master was proceeding with all due diligence to load his full cargo of hemp by screwing it down in the usual way, when about the ninth day a rumour was circulated of an embargo being about to be laid by the Russian government on all British vessels; and the person who was agent for the British factory at Cronstadt, and agent also to the house at St. Petersburg, who were the agents to the merchant charterer of this ship, in consequence of instruction received from the British Consul-general at Petersburg, desired the captains of such British vessels as were ready to proceed to sea, to do so as soon as possible, as he expected an embargo might take place immediately. In consequence of this the master gave orders to leave off screwing down hemp, and to fill the ship as fast as possible by hand, and the whole day was employed this way, and the ship filled as fast as could be done by hand. In the evening the ship sailed, with something more than half the cargo that she could have carried if the hemp had been screwed down. The merchant had a sufficient quantity of hemp for a full cargo lying by the ship's side in lighters: many other British vessels sailed the same evening or the next morning without full cargoes; some however remained, and afterwards completed their lading and were not detained, as no embargo in fact was imposed until six weeks after this time. The ship would have completed her lading within that period. The master sailed away without any communication with the defendant's agent at Petersburg, who came to Cronstadt as soon as he had notice of the circumstance, with intention to stop the ship, but had arrived too late. The master acted *bona fide*, and as an honest man, and there was reasonable and well-grounded apprehension for what he did. The goods taken on board were brought to London, and there delivered to the merchant. The merchant sued the master for not bringing a complete cargo according to his contract. It was argued that the master was excused, either by the operation of the above clause in the contract, or by that general principle of law which requires every subject, as a matter of public duty, to save the property of persons entrusted to his charge from falling into the hands of the enemies of his country. But the court held that neither of these grounds furnished an excuse under the peculiar circumstances of this case.

2d. *As to perils of the sea.**

[375]
The excep-
tion of per-
ils of the
sea is gener-
ally introdu-
ced into
charter-par-
ties. In the
construc-
tion of
them, the
Courts have
held that

1. *PICKERING v. BARCLAY*. 2 Roll. Ab. 248; and Style. 132. S. P. T. T. 1687. K. B. *BARTON v. WOLLIFORD*. Comb. 56. S. P. *MORSE v. SLUE*. H. T. 1672. K. B. 1 Vent. 190.

In an action of covenant on a charter-party which contained an exception of
* Every accident happening by the violence of the wind or the waves; by thunder and lightning, by driving against rocks, by the stranding of the ship, or by any other violence

the perils of the sea, the defendant pleaded that the ship was taken by hostile persons unknown, armed in a warlike manner; and thereupon the question whether such a capture were within the exception, was brought before the Court by a demurrer in the most strict technical form. The Court, however, took the opinion of several merchants by certificate in writing, and afterwards by examination in open court, upon the meaning of the words of this exception, as established by usage among them, and decided, in conformity to such opinion, that the defendant was not liable.

2. *BONDRETT HERLIGG.* H. T. 1818. C. P. Holt. N. P. C. 149.

Assumpsit on a policy of insurance for a total loss incurred by perils of the sea. It appeared that some of the goods had been recovered from the wreck, and placed on the shore, whence they were stolen by pirates. Holden, that as the loss originated as averred, and as the plaintiffs never got possession of the goods saved, the averment was substantiated.

3. *BULLER v. FISHER.* M. T. 1818. N. P. 3 Esp. 67.

It appeared, in this case, which was brought for damage arising by loss of goods shipped by the plaintiffs on board the defendant's vessel; that two ships, A. & B., were following one course, while the defendant's ship was proceeding in the opposite direction; that the vessel B. steered so as to suffer the defendant's ship to pass; but the crew of the latter, not perceiving their intention, did not avail themselves of the present opportunity, and unavoidably ran foul of the vessel A. and sunk. It was contended, for the defendant, that the accident must be considered as a *peril of the sea*, excepted in the deed of charter-party. Lord Kenyon held, that though the expression *peril by sea* could not be extended to all losses arising from mismanagement, yet, that as the present case was not the consequence of negligence on the part of the defendant, he was protected by the excepting words of the instrument.—Verdict for defendant.

which human prudence could not foresee, nor human strength resist, may be considered a loss within the meaning of the term "perils of the sea;" see 1 Show, 323; Roccus, not. 64. But if a ship be driven, by stress of weather, on an enemy's coast and is there captured, it is a loss by capture, and not by perils of the sea; Peake, 212.

In considering this subject, the first question that presents itself to the mind of an English lawyer is, how is the question of perils of the sea to be decided? The particular manner in which a loss happens must always be a question of fact; but admitting it to have happened in a particular manner, is the judge, before whom a cause is tried, to pronounce whether it be a peril at sea, or are the jury to declare it by their verdict? In general, the construction of ambiguous expressions in written instruments is the proper province of the judge, but in mercantile instruments, it often happens that the judge must have recourse to the usage of trade and the practice among merchants, to obtain a proper knowledge of the meaning of the words. When the meaning of the words is ascertained, it will rarely happen that the judge and jury can differ in the conclusion; and probably this question, although it might afford matter of stipulation, will become a matter of serious practical inquiry. The cases in the text certainly furnish very strong authority to show, that even if the decision of this question does not strictly and properly belong to the judge, yet his decision will be guided by usage, and the course of practice among merchants, which are matters of evidence and of fact; see Abbot on Shipping, 265. and *post*, tit. "Insurance."

* In a case which came before the Court of K. B. a short time before the late alteration of the bill of lading, and which was an action brought to recover the value of goods, for which the master had signed a bill of lading, containing an exception only of the perils of the sea, although made during the time of a war, which goods were lost, in consequence of the ship being designedly struck by the vessel of an enemy, it was doubted by the Court, whether a loss so occasioned were within the meaning of this exception, and the cause never proceeded to a final judgment; Beven. v. Tomlinson, E. T. 1796; Abbott, 267. The express exception afforded room in this case to contend that the exception of the act of the king's enemies which arises out of general rules of law, was meant to be excluded in the particular instance; Abbott, 263.

† But where a boy ran against the pier of a bridge, and foundered by reason of the shock, and the merchant endeavoured to recover of the owners, by alleging, that the injury would not have occurred if the vessel had been stouter; the Court held, that the conveyance was sufficient of its kind, and that the freighter had no right to expect more; 1 Str. 128; Bul. N. P. 69. This distinction between the two cases is evident. In the one abridged in the text there was no fault or negligence in the persons belonging to either vessels; in the case in Str., both parties were held to have been guilty of negligence: the one in leaving his anchor without a buoy, the other in not avoiding it, as, when he saw the vessel in the

the ship being overpowered and plundered by pirates, empties the owners from any liability for the loss of goods under such circumstances.* And this rule holds, although part of the goods are lost at sea and part on shore. } 376 } So a loss sustained in consequence of one vessel running foul of another, is a *peril of the sea*; if due diligence has been used by the crew to avoid the disaster;†

And all absence of design, on the part of the persons on board the vessel, causing the injury be established.

4. SMITH v. SCOTT. M. T. 1811. C. P. 4 Taunt. 126.

So where a loss arises from the crew being sent on shore, and impressed; [377]

A declaration on a policy of insurance averred, that the ship A, on which the policy was made, had been lost and stranded by *perils of the sea*. It being proved that the ship A. was sailed against by another vessel B. through the gross negligence of the crew of the latter; the defendant's counsel contended, that the averment was not supported by evidence. The plaintiffs had a verdict, subject to the opinion of the Court; and on a motion for a rule nisi for a new trial, the Court held that the averment was well proved, observing, that great inconvenience might arise to owners of ships, if protection from *perils of the sea* could be obtained where the sea alone was instrumental in effecting the loss.—Rule refused.

5. HODGSON v. MALCOLM. M. T. 1806. C. P. 2 N. R. 336.

Action on a policy of insurance. The declaration averred, that "by perils of the sea, and by force and violence of the wind and waves," the ship was greatly injured, &c and wholly lost. It appeared in evidence, that the vessel was lying in the port of P., and that it being necessary to remove it to another part of the port for the purpose of unloading, the master sent on shore two of the crew to adjust the ropes used in mooring the ship, but they were impressed immediately on their landing, and were not suffered to perform their duty, in consequence of which the ship ran on shore for want of a fast line, and her timbers were very much strained. The plaintiff was nonsuited, and a rule to show cause why a verdict should not be entered for the plaintiff, or a new trial granted, the Court (Sir James Mansfield, C. J. dissentiente) held, that the averment of the particular loss relied on was borne out by the evidence, as it appeared that the master had used every means in his power to effect the movement of the ship in safety, and that as his attempt had been frustrated by circumstances not under his control, the loss must be said to have arisen from the force of winds and waves, as relied on by the plaintiff.—Verdict entered for plaintiff by consent.

Or where any injury arises from being taken in tow by mistake.

6. HAGEDORN v. WHITMORE. H. T. 1816. N. P. 1. Stark. 157.

A certain vessel H. having met with a king's ship A., and mistaking her for a French vessel, produced false papers for the purpose of concealing the British licence, in consequence of which A. took the vessel H. in tow, and the latter being obliged to crowd sail in order to equal the rapidity of the other vessel, shipped a considerable quantity of water, and the goods were thereby much injured. The Court held, that the damage having been actually sustained from the force of the sea while the ship was deprived of the control of her crew, it was a loss by *perils of the sea*, within the terms of the policy.

But this excuse and the principle of it, will not extend to justify captains and owners for any obedience to an unauthorized direction or command of his majesty's officers, or to relieve them from a full responsibility to the freighter, for any damage to the cargo,

7. PHELPS v. AULDJO. M. T. 1810. 2. Cambp. 350.

In this case, which was an action for the loss of a ship and cargo, it appeared that whilst the ship Margaret and Anne was lying in port, the master, having taken in almost the whole of her cargo, the captain of an English ship of war lying near, the topmast and yards of which were then struck, ordered the master of the ship Margaret and Anne to go out to sea to examine a strange sail, which was discovered in the offing bearing enemies colours. It appeared that the master did not remonstrate against such orders, but unmoored and put out to sea; that although 40 of the crew of the ship of war had been on board the Margaret and Anne in the morning of the same day, they had all been withdrawn before the master begun to unmoor, and that no violence or threats were used to induce them to do so; and that he fired two guns at the strange sail, and brought her too, when she appeared to be a neutral, and he then returned to his moorings. Being examined as a witness, he said he considered himself bound to obey the orders of the captain of the ship of war, but he did not make any protest on the occasion. It was contended for the plaintiff that

river, he must have known that there was an anchor near at hand; or if it be taken, that negligence was imputable only to the master who had left his anchor without a buoy, then he was answerable over to the master and owners of the vessel whose cargo had been injured; and, indeed, the accident had happened in the course of a navigation to which the exception of the perils of the sea did not apply; see Abbott, 268.

the deviation was excused by the control exercised over the master. He did not expostulate, because his expostulation would have been unavailing. The captain of the ship of war had ample means of enforcing his orders. If this was held to be a fault, the consequence would be, that masters of merchantmen would constantly resist the commands of the king's officers. But *Lord Ellenborough, C. J.* was of opinion, that it was an unexcused act; for that there was neither duty nor duress, neither a moral nor a physical compulsion. If a degree of force had been exercised towards the captain, which either physically he could not resist, or morally, as a good subject, he ought not to have resisted, the deviation would be justified.

8. THOMPSON V. WHITMORE. M. T. 1810. C. P. 3 Taunt. 227.

A declaration on a policy of insurance averred, that the vessel on which it was made had been "by the waves, winds, and perils of the sea," bilged, &c. It was shown that the ship was narrow-floored, and had been placed on the beach in order to be caulked, and in a situation where vessels of much greater bulk were usually placed for that purpose; and that, on the second day of her lying there, it was found, that the planks on which she depended for support had given way, and she lay on her side, and was full of water, which had rushed in with the rising tide. The Court held, that notwithstanding the injury was consequential on the force of the tide carrying away the planks on which the ship was stayed, the circumstance of the vessel being at the time on the land differed the case from those where the sea and land were concurrent causes of injury; in which cases the sea was considered as the primary acting cause.—Nonsuit, and a rule nisi to set aside refused.

9. ROHL V. PARR. H. T. 1796. N. P. 1 Esp. 445.

Case on a policy of insurance. Averment of a loss by *perils of the sea*. It appeared, that on the ship's arrival at one of her destined ports, it was found that the worms had injured her bottom, so that it would be impossible for her to proceed on her voyage, and she was thereon condemned. The question was left to the jury, who found that the description of loss averred would not apply to the case in question.—Verdict for defendant.

10. GREGSON V. GILBERT. E. T. 1783. K. B. Park on Insurance, 83. S. P.

CULLEN V. BUTLER. M. T. 1815. K. P. 4 CAMPB. 289.

An action was brought upon a policy of insurance, for the value of certain slaves insured by that policy. The declaration stated, "that by perils of the sea, contrary winds, currents, and other misfortunes, the voyage was so much retarded, that a sufficient quantity of water did not remain for the support of the slaves and other people on board, and that certain of the slaves mentioned in the declaration perished for want of water." The facts appearing in evidence were, that the ship, being bound from Guinea to Jamaica, had missed the island, and the crew were reduced to great distress for want of water; that the captain consulted with the crew, and it was unanimously agreed upon, that some of the slaves should be thrown overboard, in order to preserve the rest; that at the time this resolution was formed, there remained but one day's full allowance of water, at two quarts per man. The jury, upon this evidence, found a verdict for the plaintiff, with damages at £30. a head, for every slave thrown overboard. A motion was afterwards made for a new trial, upon the ground that this was not a loss by perils of the sea.

Lord Mansfield said: this is a very uncommon case, and deserves further consideration. There is great weight in the objection that the loss is stated, by the declaration, to have arisen from the perils of the sea, and that the currents, &c. had made the ship foul and leaky. Now does it appear by evidence that the ship was foul and leaky? On the contrary, the loss happened by mistake, the Jamaica for another place. Besides, a fact has been mentioned by the counsel, of throwing some overboard after the rain fell; a fact which is not agreed on by both sides, though a very material one. And *Mr. Justice Buller* observed: the declaration does not, in any part of it, state the loss which has been the occasion of this demand; and it would be very mischievous if we were to overturn this objection. Suppose, for a moment, that the underwri-

in consequence of such compliance. A loss happening in the course of such an act will not come with in the perils of the sea in the legal interpretation of the restrictive covenant. [378] Where a ship had been hove on shore within the tide-way for the purpose of being caulked and was there injured, it was holden not to be a loss by perils of the sea. So a destruction of the vessel by worms at sea, does not come within the exception. Nor a loss happening by mistake of the captain.

[379]

ters, in some cases, are liable for the mistake of the captain, yet if they are not liable in others, the nature of the loss must be stated in the declaration, that the defendant may have an opportunity of moving in arrest of judgment, if it be not sufficiently alleged. But it would be impossible for the defendant in this case, to move in arrest of judgment, for the facts of the case, as proved, are different from those stated in the declaration. The Point of law in arrest of judgment, can only be argued from the facts stated on record; and the declaration in this case states the loss of the plaintiff to have happened by perils of the sea.—The rule for a new trial was made absolute on payment of costs. See 6. T. R. 656.

Nor a loss arising from a ship being strained while being hove down.* Exception in charter-party as to the embezzlement or barratry of master, &c.

11. ROWCROFT v. DUNSMORE. 1807. K. B. cited in THOMPSON v. WHITMORE. 3 Taunt. 227.

In this case a ship had her timbers strained during the process of hearing her down; she was then drawn on land, and afterwards bilged in consequence of the strain. Lord Kenyon, C. J. held, that though the ship was hove down necessarily, it was but an accident, and not a peril of the sea.

3d. *As to embezzlement and barratry.*

Without a particular exception in the charter-party, as the owners would be bound for the performance of its stipulations, in all events, though out of their power to avoid, they would also be liable for all the acts of the master and mariners, against which no human caution or foresight could guard, as in the case of embezzlement, barratry, or the like. It therefore behoves them, when they are parties to the contract of affreightment, to have a clause introduced to prevent their liability to answer for the embezzlement or barratry of the master or mariners. Indeed their responsibility in these or the like cases may be guarded against by the mere enumeration of them, in addition to the other perils contained in the usual exceptions. Where the master is party to the contract, it would be equally proper for him to extend the exception to the embezzlement, &c. of the mariners. What amounts to barratry will be pointed out post, tit. Insurance; *et vide ante*, tit. Barratry.

(K) AS TO THE DISSOLUTION OF THE CHARTER-PARTY.

THOMPSON v. BROWN. T. T. 1817. C. P. 6 Taunt. 656; S. C. 1 B. Moore 358, overruling Doug. 272.

[380]
A charter party can not be discharged but by deed.

The plaintiff, as owner of a vessel, covenanted that, being laden with such goods as the defendants might choose to put on board, she should sail from the port of London, and should proceed to J., where she should give notice to the defendants' agents of his readiness to unload, and make a true delivery of the cargo, agreeably to bills of lading; and, when ready to reload, should receive from the defendants' agents at J., or at one of several ports mentioned in the instrument, as such agents might direct, a full cargo, and should return and deliver the cargo so received at J., or elsewhere, at London. It appeared that the vessel sailed to and arrived at J., at which port the defendants' agents directed the master to sail to Y., one of the ports mentioned in the charter-party, and there receive a full cargo, and proceed therewith to Liverpool instead of London; which orders the plaintiff complied with. The question for determination was, whether the plaintiff had performed his covenants so as to enable him to recover in covenant on the deed. *Per Cur.* The maxim that a deed cannot be altered by matter not under seal, is inflexible. The plaintiff here has acted in direct opposition to the stipulation in the charter-party; and though under the order of the defendants' agents, the latter had no authority to control the terms of the deed.—Judgment for defendant. See 1 East. 619; *ibid.* 620; 12 *ibid.* 583; 3 Lev. 234; 2 Wms. Saunders, n. 3. 352. a; 1 Doug. 272; 3 T. R. 592.

(L) AS TO DEMURRAGE. See post, tit. Demurrage.

(M) AS TO FREIGHT. See post, tit. Freight.

(N) AS TO PRIMAAGE, PRIVILEGE, AVERAGE, PASSENGERS, PILOTAGE, AND PORT-CHARGES, *vide* these respective titles.

* And it has been already stated (*ante*, p. 154.), that every loss proceeding directly from natural causes, is not to be considered as happening by a peril of the sea; Abbott, 265.

(O) AS TO THE REMEDIES BY, AND AGAINST, OWNERS AND MASTERS OF VESSELS.

(a) By action.

1st. Of the form of action.

1. By the owner against the hirer.

1. **ATTY V. PARISH.** M. T. 1804. C. P. 1 N. R. 104. S. P. **HUNTER V. PRINSEP.** M. T. 1808. K. B. 10 East. 378. S. P. **COOPER V. CHILD.** H. T. 1673. C. P. 2 Lev. 74. S. P. **RICHARDSON V. HANSON.** T. T. 1806. K. B. Lawes on Ch. 229.

Debt for the carriage of divers goods, &c., in divers ships, &c., and for the use and hire, &c. On the trial, the charter-party was offered in evidence, when it was objected that the action should have been brought on the deed. The plaintiff had a verdict, open to a motion on the defendant's part to enter a nonsuit. On a rule nisi for that purpose, *Sir J. Mansfield, C. J.* said: it has been a long adopted practice, that where a contract has been solemnly made by an instrument under seal, the declaration should be framed on the special circumstances of the deed, by which the proof of the contract is facilitated, and the defendant has the advantage of a protest. We see no grounds in the present case to exempt it from a submission to the same rule, but on the contrary the strongest argument in favour of the defendants objection, for the instrument is framed in the most special manner, whereas, from the mode of declaring adopted, the natural supposition would be, that the plaintiff's claim was of a much less specific and more general nature. The case cited from *Hardres*, 332. affords considerable support to this opinion; for when that case decides that *nil debet* is a good plea to an action of debt for rent, notwithstanding a lease, it shows that case to be an exception from the adopted course of pleading; and it goes farther, and declares, that were the action founded on the grant of annuity, the plea would be bad.—Rule absolute. See 7 T. R. 207; 2 East. 142; 3 Lev. 138; 2 Inst. 673: *Abbott*. 186; 1 M. & S. 573; 2 M. & S. 303.

2. **LESLIE V. WILSON.** M. T. 1821. C. P. 6 B. Moore, 415. S. C. 3 B. & B. 171.

Case against the owners and captain of a ship for negligence in carrying the plaintiff's goods, whereby they became damaged. It was contended, for the defendants, that the plaintiff, having a superior remedy, was precluded from bringing his action in this form. The plaintiff had, however, a verdict, and the point was reserved for the opinion of the Court. On the case coming on to be argued, *Dallas, C. J.* said, that notwithstanding the plaintiff might have resorted to his enemy by covenant on the charter-party, the defendants, as owners of the vessel, and as persons who were to derive profit from the carriage of the plaintiff's goods, had an incumbent duty to perform in conveying them safely, and were therefore answerable if damage arose from their neglect so to do.—Judgment for plaintiff.

- 3 **SHEPHERD V. HOOKER.** E. T. 1738. K. B. Andr. 156; S. C. 2 Str. 1039.

This was a writ of error on a judgment in the Common Pleas in an action of debt. The plaintiff below declared upon a charter-party, whereby he agreed to go a voyage for the defendant, &c., and the plaintiff showed that he began and ended the voyage; and then averred that having finished the voyage within a specified period, the sum due for freight, came to, &c; and that the defendant had paid a certain part thereof; and that £500. remained due. The other pleadings are not material to be stated. Suffice it that the plaintiff was adjudged to recover "his said debt," and it was now assigned for error that the form of action was improper, and that it ought to have been covenant, for although an action of debt lay for a certain sum, which was covenanted to be paid, yet that it was otherwise where the sum was uncertain, and depended on a contingency. On the other side it was argued, that the sum demanded must be taken for a penalty, for the declaration began in debt; and concluded accordingly; and that consequently this was a proper action; that besides it was a general rule that where a demand arises on a deed, an action of debt, as well as of covenant, will lie; that it was necessary for the sum to be stipulated

by the deed; but that if it were reducible to a certainty, it was sufficient; that in the case before the court the defendant agreed to pay a specific sum per month as long as the ship was out on the voyage, and that therefore, by averring how long the ship was out on the voyage; and that therefore, by averring how long the ship was out, *satis constat* how much exactly was due. The Court seemed, notwithstanding other arguments unconnected with the point now abridged, to agree (*Lee C. J. absente* that this was a proper action, as the demand arose on a specialty, and the sum was ascertained. *See Cro. Eliz.* 661, 758; 1 *Roll.* 591. 597; *Styl.* 41; 3. *Lev.* 428.

4. WHITE V. PARKINS. T. T. 1810. K. B. 12 East. 578.

The plaintiffs contracted, by charter-party sealed, to let a ship then in the Thames to freight, to the defendants, for eight months, to commence from the day of her sailing from Gravesend, on the voyage there stated, and covenanted that she should sail from the Thames to any British port in the English channel, there to load such goods as the freighters should tender, and sail to the West Indies, and bring back a return cargo to London. They afterwards agreed by parol with the defendants, that the ship, instead of loading at some port in the channel, should load in the Thames, and that the freight should commence from her entry outwards at the custom house. The Court held, that this subsequent parol contract was distinct from, and not inconsistent with, the contract by deed, being anterior to it in point of time and execution, and might therefore be enforced by action of *assumpsit*. *See 1 Vent.* 100.

2. *By the hirer against the owner.*

RANDALL V. LYNCH. H. T. 1810. K. B. 12 East. 179.

A ship was let to freight by charter-party from the plaintiff to the defendant. A clause was inserted in the deed as follows: "and it is hereby covenanted and agreed by, and between the said parties, that 40 days shall be allowed for unloading, loading and again unloading the said cargoes, to commence and be computed from, &c." This was an action of covenant, in which the breach alleged was, that the defendant did not nor would unload, load, and unload again the said respective cargoes of the said vessel within the 40 days in the charter-party mentioned, and stipulated and allowed for those purposes, computed, &c.; but kept and detained the said vessel, with a part of the homeward-bound cargo on board her, for 35 days after the expiration of the 40 days, whereby the plaintiff, during all the time, &c. lost the use and profit of his vessel, contrary to the form and effect of the charter-party, and of the defendant's covenant in that behalf made, &c. A verdict was found against the defendant. A rule *nisi* had been obtained to arrest the judgment, on the ground that an action of covenant would not lie, the covenant being only that 40 days should be allowed to the freighter for loading and unloading the vessel, and not that he would not keep it longer, or that he would deliver it up at the end of that time. *Sed. per Cur.* A covenant is nothing more than an agreement between the parties under seal; and if they covenant together that it shall be lawful for one to hold the other's property for a certain time, that is emphatically an agreement that he shall not detain it beyond that time, but shall then give it up to the owner; if then he detain it for a longer time, it is a breach of his covenant. The action is therefore properly framed in covenant, and not in *assumpsit*; for wherever there is an express contract by deed, *assumpsit* cannot be maintained, on any promise, arising by implication of law out of the terms of that contract.—Rule discharged. *See 1 Leon.* 321; 1 *Saund.* 319.

2d. *Of the cause of action.*

SMITH V. WILSON. H. T. 1817. K. B. 6 M. & S. 78.

This was an action of covenant on a charter-party of a freightment, by which the owner covenanted to take on board at London the freighter's goods, and to proceed therewith to Monte Video, and there deliver them, and receive another cargo, and proceed therewith to the port of discharge in Great Britain, and there deliver the same, and end the voyage; in consideration of which the freighter covenanted to pay so much per month for freight during the voyage to M. O., and back to her port of discharge. The declaration alledged that

An action may, however, be maintained on a parol contract, notwithstanding a sealed charter-party, if such contract be distinct in its provisions, and not in consistent with the deed. The general form of action in a suit instituted by the hirer against the owners, is covenant, [383] or *assumpsit*, according to whether the charter-party is by deed, or merely in the shape of a memorandum. And where the owner and freighter covenanted by deed, that 40 days should be allowed for loading and unloading, the freighter was holden impliedly to covenant not to detain the ship longer than that time; and that having done so, the owner's remedy was upon the

the ship, after taking in a cargo in Great Britain, and proceeding in part on deed, and her outward voyage, was, against the will, and without the default of the owner, and through the act of the supercargo, servant of the freighter, seized and brought back to London, and detained until restored to the owner; in consequence of which she required repair, and which plaintiff caused to be done with proper dispatch, and was ready and willing to cause the ship to prosecute and complete her voyage, and offered her to defendant for that purpose, and requested him to dispatch her; and assigned a breach that defendant refused to dispatch her, and renounced the charter-party and further prosecution of the voyage, and discharged plaintiff from the same; *per quod* plaintiff was hindered from endeavoring to complete the voyage, and to earn the money stipulated by the charter-party to be paid at her port of discharge. It was objected to the declaration, that the breach was ill-assigned, there being no covenant which bound the defendant, under the circumstances alleged in the declaration, to dispatch the ship a second time on her voyage, the charter-party having made no provision for the events which had happened; and it was contended that although the defendant might, if new circumstances had arisen not contemplated by the charter-party, which prevented the completion of the voyage, be liable in *tort* if caused by him, covenant did not lie. The Court acquiesced in this doctrine, and said: circumstances have arisen different from those contemplated by either party, for which neither has made any stipulation in the charter-party, and we cannot infer an obligation. There has been a performance once of the covenants *quoad* the inchoate voyage; and the argument is, that this must be renewed *toties quoties*. It might thus be continued for such a series of years, that the very fabrick of the vessel might be worn out before the charter party was satisfied, if we were once to let the parties loose from the terms of the contract.—Judgment for defendant. See 2 Lev. 116; 1 Roll. Abr. 518.

3d. Of the parties to the action.

1. In general.*

1. MOORES v. HOPPER. E. T. 1807. C. P. 2 N. R. 411. S. P. MORRISON v. PARSONS. E. T. 1810. C. P. 2 Taunt. 407. 414. S. P. SPLIDT v. HOLMES. M. T. 1808. K. B. 10 East. 279.

Whether the instrument be under seal or not, an action at law, grounded upon it, must be brought in the name of the party to it, and not in the name of another to whom he may have assigned his interest.

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The defendant, a captain of a vessel, entered into a charter-party with one N., by which he agreed to receive on board from N., his agents or assigns, a cargo of fruit. On lading the ship, the defendant signed bills of lading, which expressed that the fruit was shipped by order of the plaintiff, and directed that it should be delivered to the plaintiff's order. The cargo was injured in consequence of the defendant's negligence; and on the trial of an action brought thereon, it was objected that the action should have been in the name of A., and the plaintiff was nonsuited. On a rule *nisi* for setting aside this nonsuit, the Court concurred in the objection; observing, that as N.'s agents or assigns were the only persons from whom the defendant was to receive the cargo, and as it did not appear that any assignment had been made to the plaintiff, the rule must be discharged.—Rule discharged. See 1 Campb. 532; 4 Taunt. 452; 2 M. & S. 426; Abbott on Shipping 186.

* In suing upon contracts by charter-party, all the person by whom the contract is made, and who are jointly interested in it, or the damages to be recovered for its non-performance, must join in the action, for otherwise the plaintiff is liable to be non-suited at the trial, if it then appear that the contract was made with other parties than those who are joined; *sed vide* 3 Keb. 444.

† Although, however, it may be viewed as an established point, that an action on a charter-party, whether by deed or by writing under hand only, must be brought in the name of the parties to such contract; a distinction must be taken between a deed which is expressed to be made between certain parties on the one side and certain other parties on the other side; and a deed which is not so expressed, but begins "To all to whom these presents shall come," which is, in fact, the peculiar form of a deed-poll. In a deed *inter partes*, no grant or covenant can be made with any other person than such as may be parties to the deed; but in a deed-poll, a grant or covenant may be made to any person, though not parties to the deed. In the deed *inter partes*, though a person not enumerated as one of the parties should be one of the covenanters or obligees, and in that character should

And the action must always be brought by and against the principal parties to the contract, and such persons as may contract merely as the agents of others:

2. **BROUNCKER v. SCOTT.** T. T. 1811. C. P. 4 Taunt. 1. **S. P. JESSON v. SOLLY.** T. T. 1811 C. P. 4 Taunt. 52.

Assumpsit by a master of a vessel for demurrage, for the detention of a vessel for an unreasonable time, for the purpose of unloading, after the completion of her voyage. A question was reserved for the opinion of the judges, whether the action was maintainable.

Per. Cur. The endeavour to assimilate this case to those where the master has been allowed to support an action of this kind for freight, must fail, as the grounds on which such actions have been upheld are materially different. In the cases relied on, the master is, by the terms of the charter-party, to "deliver the goods on payment of freight:" he would, therefore, be liable to the owner if he delivered before the freight was paid, and has therefore been permitted to resort to the consignee on his implied contract.—Rule absolute for a nonsuit.

3. **SHIELDS v. DAVIS.** H. T. 1815. C. P. 6 Taunt. 65. **S. P. BROWN v. HODGSON.** M. T. 1811 C. P. 4 Taunt. 189.

Assumpsit by a master of a vessel on a contract to pay freight, implied on the defendant's acceptance of certain goods. The defence offered was, that the goods had sustained considerable damage from the plaintiff's negligence. The plaintiff had a verdict; and on a rule nisi for a new trial, it was holden, that the safety of the goods was not a condition precedent to their delivery, and therefore that the defendant having received them, and reaped the benefit of the carriage, he was liable for the freight incident to such carriage; and that if the goods had been injured through the plaintiff's neglect, the defendant must avail himself of it by a cross action. See 1 T. R. 112; 2 Esp. 493; 1 H. Bl. 82; 7 T. R. 359; 11 East. 130; 4 Campb. 195; 1 M. & S. 497. 581; 2 Marsh. 497. 501; Park on Insurance, 403; 2 M. & S. 485; 15 East. 4.

Unless where the agent is beneficially interested; [386]

Or the contract is in terms made with him.

4. **JOSEPH v. KNOX.** M. T. 1813. 3 Campb. 320.

This action was brought by the agents of A. for the negligence of the defendant in not carrying the goods of their principal. It appeared from the bills of lading that the plaintiffs received the goods in question from A. for the purpose of transmitting them to B., whose property they swore they were, and that they had paid the freight. It was urged that, on the principle acted on in case of carriers, the plaintiffs, as agents of the consignors, could not maintain this action. But the Court held, that the facts disclosed by the bill of lading, viz. the shipping the goods, and the payment of freight, and which bill the defendant's agent signed, established a sufficient consideration moving from them to enable them to maintain the action.

5. **WILLIAMS v. MILLINGTON.** M. T. 1788. C. P. 1 H. Bl. 82.

In which case, however, the principal may sue:

The plaintiff was an auctioneer, and employed by one A. B. to sell his goods by auction. The sale was at A. B.'s house, and the goods were known to be his property. The defendant was a purchaser, and was now sued for the assign, seal, and deliver the deed, yet he is not competent to give a release, nor will his release bar the action of any one who is a party. Therefore, in action brought by one Scad. amore and others v. Vanderstone, (2 East, 678; 2 Rol. Abr. 22. F. 1. S. 4.) upon a charter-party by indenture, expressed to be made between the plaintiff and others, owners of a certain ship, whereof one Robert Pitman was master, on the one part, and the defendant on the other part, whereby the plaintiff covenanted with the defendant and Pitman, binding himself to them in a penalty for the performance of the covenants, and concluding, "in witness thereof the parties to these have put their seals, &c.;" Pitman having executed the indenture, the defendant pleaded, in bar, a release by him; but on demurrer the above distinction was taken and agreed upon; and it was adjudged, that this release of Pitman did no bar the plaintiff, because Pitman was no party to the indenture. But if the indenture express that the master of the ship lets it to the merchant, with the consent of the owner, and then goes on to state that the merchant has entered into certain covenants, therein expressed, with the owner, in this case the owner may bring the action on the covenants; though, unless such owner may have sealed the deed, he cannot be himself sued upon it, the distinction being, that he is a party to the covenants of the deed, though not to the obligation; others have bound themselves by deed to him, and may be sued as bound by deed; but he has not so bound himself, nor can he be sued by them; 2 Lev. 74; 3 id. 133; Holt on Shipping, 6. and Lawes on Charter-parties, 11.

mount of the purchase by the plaintiff, who had previously paid it to A. B. A verdict was found for the plaintiff, to set aside which a rule nisi had been obtained. In support of the rule, it was contended, that as the owner of the goods might have brought this action against the defendant, so it was clear that the auctioneer could not bring it, because it was a rule of law, to which there was no exception, that several persons could not maintain distinct and separate actions on the same contract against the same defendant.

Sed per Cur. It is not a true position that two persons cannot bring separate actions for the same cause. The auctioneer has a special property in the goods, which is quite sufficient to support the action. Without doubt the right of A. B. was superior to that of the plaintiff. How far he might be preferred to the plaintiff in bringing the action, might be fit to be considered. But it being clear that the defendant has no right to put any owner forward in order to prevent the auctioneer from having this remedy, the rule must be discharged.—Rule discharged. See 7 T. R. 359. 360. n. a; 4 B. & A. 437.

6. SCHACK V. ANTHONY. T. T. 1813. K. B. 1 M. & S. 575.

The master of the plaintiff's ship entered into a charter-party, as agent for the plaintiff, with the defendant, a partner in the house of M. and Co., for the delivery of goods upon a stipulated freight. The goods were delivered to M. and Co. according to the bill of lading. This was an action brought against the defendant for the freight. The judge before whom the cause was tried was of opinion that the action should have been brought on the charter-party; but he permitted the plaintiff to take a verdict, subject to the defendant's privilege to move, to enter a nonsuit. A rule was accordingly obtained, when it was urged that the freight, having been stipulated for by deed, was not recoverable in *assumpsit*. In showing cause, it was, however, denied, that the rule, as to an implied promise being merged in a specialty, was applicable to any other cases than those where the implied promise and the specialty were between the same parties.

Sed per Cur. This action cannot be supported. If a bond were given to a trustee, it could hardly be contended that an action of *assumpsit* might be maintained by the *cestui que trust* for the recovery of the money secured by the bond. There is no case, where, the interest being the same as that secured by the deed (which is certainly the fact in the case before us,) it has been holden that *assumpsit* will lie. Let the rule be therefore made absolute. See 2 T. R. 479; 7 id. 207; 12 East, 578; 5 Burr. 2611.

2. In case of joint and several covenants.

BOLTON V. LEE. T. T. 1671-2. B. B. 2. Lev. 57; S. C. 3 Keble, 39. 50.

Covenant upon charter-party between Bolton, owner, and Lee and Morgan, freighters, of a ship, by which Bolton lent them the ship to freight a voyage to G. for 43l. per month; it was mutually covenanted between the parties, and *quemlibet eorum modo sequente*; and then followed divers other covenants, and a covenant for the payment of freight; viz., when the ship arrives at G., that the freight then due should be paid in England upon notice of the arrival, and when she arrives in England that all which should be due from the time of the last payment was to be paid; it was then set forth, that at such a time the ship arrived at G., and that six months and ten days were then passed, which came to so much, whereof notice was given; and that afterwards, at such a time, the ship arrived in England, and that the freight, at the time of the last payment for six months, and the freight since, came to 287l. 4s. and that the defendant had not paid any of the sums. The defendant demurred, and took two exceptions to the declaration: 1st, that the action was brought against one of the freighters, and not against both, and the covenant for them, and *quemlibet eorum*, make it disjunctive between the parties of both sides, but left it joint of the one part and several of the other, as the duty itself was, which ought to be paid by both the defendants, each having an equal benefit; and that the *quemlibet eorum* should be referred to the plaintiff only, who was the one side. *Sed Per Cur.* This cannot be allowed, for the covenant, being between them and *quemlibet eorum*, if joint and several of both sides.—

Provided there be no express contract under seal with the agent. [387]

The covenants or agreements in a charter-party are joint or several, according to the intent of the parties or the words of the contract. In conformity with this rule, in covenant on a charter-party between A. on the one part, and B. & C. on the other, *et quemlibet eorum*, the Court held, that A. might bring an action against B. without joining C.,

as this is a Judgment for plaintiff. See *Adderton v. Dunton*, 2 Cro. 247; Poph. 209; *Clotworthie's case*, Cro Car. 436; 2 Cro. 498; 2 Show. 56; Cowp. 766; 1 Lev. 51; 1 T. R. 447; 2 T. R. 29; 1 Saund. 154; 5 Co. 186.

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The Court will not allow the venue to be changed in an action on a charter-party, unless special grounds are alleged in the affidavit. The mode of framing the body of the declaration is consonant with the method adopted in other cases, according as the defendant is sued on a sealed or parcel contract.

4th. Of the pleadings.

1. Of the declaration.

(1 a) Of the venue

MORRIS V. HURRY. H. T. 1817. C. P. 1 Moore. 54.

A rule nisi to change the venue in an action on a charter-party who opposed, on the ground that as the charter-party appeared to be a deed, it could not be sworn that the cause of action was confined to any county in particular, and that special circumstances alone would warrant the granting the rule.—Rule discharged. See 1 B. & P. 20; 2 *ibid.* 355.

(2. a) Of the body of the declaration.

When the charter-party has been entered into by deed, which is generally the case, debt or covenant are, it has been seen, *ante*, p. 380, the forms of action adopted. In each case the charter-party in itself, or rather so much of it as is relative to the plaintiff's claim, should be set out with accuracy. The date or day of making it should also be alleged, and the venue laid at the place where it may be supposed to have been made. If the date be not essential part of the contract, on account of the calculation of the time of sailing, or payment of the ship's hire, &c. being reckoned from it, exactness as to the day is not material; at all events, if it be not stated as the day on which the charter-party bears date, so as to make part of the description of the written instrument. A *profert* should be made of that part of the deed which is executed by the defendant, and which should be alleged to be sealed with his seal. The allegation of the making of the charter-party implies delivery. In setting out the material parts of the contract, all that is necessary is, that the statement be substantially correct. The substance or effect indeed alone may be set out; but that is not in general adviseable, for fear of misconstruction. The recital usually concluded with a *prout patet*. The next thing is to aver performance of the contract, so far as he may necessary, on the part of the plaintiffs; in doing which care must be taken that a strict compliance with all conditions precedent and warranties on his part be alleged, and notice and request where they are necessary, with proper time and place. But though a clause contain a condition precedent on the part of the plaintiffs, yet if it be rendered impossible of performance by the act, neglect, or default of the defendant, that may be alleged to excuse the strict performance of the condition. And if a right of action be once fairly vested in the plaintiff, though capable of being divested by a subsequent non-feazance, or the like, that, being a circumstance which defeats the plaintiff's right of action; whether it be a proviso by way of defeazance, or condition subsequent; must in its nature be matter of defence, and ought to be shown by the defendant, and after verdict for the plaintiff must be taken not to have existed, so as to leave no ground for arresting the judgment, or the like. See 1 T. R. 638. The breach in actions of this nature, as in all other actions of contract, must, if in the affirmative, be alleged with certainty of times and places, sums, &c. And the safest way always is to assign the breach in the words of the charter-party, where that includes the meaning of the contract; but care must be taken that its meaning is embraced, which is all that is necessary to be attended to. If it be requisite, different courts may be added, as upon different charter-parties, for the penalty, and also for general damages; but it is useless to declare for the penalty where there can be no further breach, for which the penalty can be wished to stand as a security. In a count for the penalty, if several breaches be assigned, it is usual to take notice of the statute 8 & 9 W. 3. c. 11. s. 8. in the assignment of the breaches subsequent to the first. And since that statute, the plaintiff may, in all cases, assign as many breaches as he pleases. It is usual to conclude each affirmative breach, by alleging it to be "contrary to the form of the charter-party, and the defendant's covenant." Though upon the face of the declaration in covenant it appears that the plain-

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tiff has demanded more than is due upon one breach, and less upon another, after verdict it is unquestionably cured, though upon general demurrer it would be clearly bad. 2 Lev. 56. In the case cited, *Hale, C. J.* is reported to have taken a difference between an action of covenant and debt. But since it has been held that it is not necessary for the plaintiff, in the latter action, any more than in the former, to recover the exact sum declared for, there seems to be no ground for a distinction between the two species of action in this respect. However, where debt was brought for the penalty in a charter-party, whereby the defendant covenanted to pay plaintiff 3*l.* per ton for goods imported, and the breach was assigned in not paying for so many tons and one hogshead, amounting to so much; upon demurrer the declaration and assignment of breach were held bad for including the hogshead, the covenant being only for the payment by the ton; though the Court suffered the plaintiff to discontinue on payment of costs, notwithstanding the action was for a penalty, and the case had been argued. *Rex v. Burnin*, 2 Lev. 124. If the declaration be in debt, whether the penalty be declared for or not, as the debt does not, as in the case of a bond, arise by the deed itself, but from matter subsequent, it is usual and proper, after stating the fact which constitutes the breach of covenant relied upon, to say, by way of a conclusion of law, "whereby an action accrued;" or "has accrued to the plaintiff, to demand and have; from the defendant the sum demanded" in respect of that breach. But in *indebitatus* counts in debt for freight, &c. this is necessary as the debt is the immediate and sole allegation of the count; and this form of *per quod actio accrevit* is therefore never inserted in the old precedents of *indebitatus* counts on a *mutuus*, or the like, though it is not usually introduced by some modern pleadres into such counts. However, the insertion or omission of this allegation, perhaps, is not in strictness at all material, and could not be even assigned for cause of special demurrer; though, as it is the principal distinguishing form between the declaration in debt and covenant, it has been thought worthy of this notice. Where the contract on which the plaintiff declares is by parol, the action of *assumpsit* is the form of action by which the liabilities accruing from it may be enforced. It is here unnecessary to enter into a minute detail of the requisites and formalities to be observed in proceeding in that form, as they are only analogous to what is adopted in cases in general, especially after what has been already noticed as applicable to actions of debt and covenant upon the deed itself. See Laws on Charter-parties, p. 227.

2. As to the subsequent pleadings.*

1. *COLE V. SHALLET*, 3 Lev. 41. *S. P. SHOWER V. CUDMORE*, T. Jones, 216.

The plaintiff declared in covenant upon a charter-party for freight and demurrage, stating that he sailed with the first wind, and so on, according to the articles; and the defendant pleaded, as to the freight, that the ship did not return directly to her port of discharge, but made divers deviations from the chartered voyage, whereby the goods were spoiled; and as to the demurrage, that it was occasioned by the neglect of the mariners to attend with their boat to reload the ship. On demurrer, the court gave judgment for the plaintiff.

2. *WARE V. CHAPPELL*, Sty. 186, cited 2 Mod. 75.

This was an action of debt upon a deed of covenant, that the plaintiff should raise 500 soldiers, and bring them to such a port; and that the defendant should find shipping and victuals to transport them; for not finding which the present action was brought; and the defendant pleaded that the plaintiff had not raised the soldiers by the appointed time. On demurrer, it was held the plea was bad, inasmuch as the defendant's covenant was argued, had the raising of the men by the appointed time been a condition precedent, there could

* All the parties who are joint contractors, and jointly liable to be sued upon the contract, must be made co-defendants; for otherwise it may be pleaded in abatement that there are other joint contractors not sued, and then the plaintiff will have to drop his action, and commence another against all persons liable; though, if the defendant omit to plead an abatement within the proper time, as it is matter peculiarly within his knowledge, who were joint contractors with him, he cannot take advantage, of being sued alone, by any objection at the time, to nonsuit the plaintiff.

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It has been holden, that where the covenants in a charter party are mutual and reciprocal, the breach of one covenant can not be pleaded in bar to an action upon another.

But a contrary rule holds where the cause of action is nullified by the disclosure of the act performed by the defendant's plea.

have been no doubt but the performance of it must have been averred in the declaration, or the non-performance of it would have been matter in bar, which might have been taken advantage of by plea.

3. *GIBBON v. YOUNG*. E. T. 1818. C. P. 2 B. Moore, 224; S. G. 8 Taunt. 254.

The defendant in this case undertook on his part to provide, for a certain vessel belonging to the plaintiff, a full and sufficient cargo of the several kinds, and at the various ports, named in the deed; and at the bay of Honduras a cargo of mahogany; and the plaintiff undertook to pay freight by the ton, of a certain number of specified feet freight measurement, "*on the right and true delivery of the said cargo*," by approved bill or bills of, &c. The declaration averred that the vessel, as covenanted, had received from the defendant's agents a full cargo of mahogany, &c.; that the said cargo was regularly delivered at the next destined port, according to bills of lading, and that on such delivery a certain sum became due to the plaintiff. General performance

of the covenants on the part of the plaintiff was averred, and the refusal of the defendant to pay the sum so due as above was assigned for breach. The defendant pleaded that a custom prevailed among the owners and freighters of vessels to the bay of Honduras, that the owner or his agent, receiving a cargo of mahogany, &c. at Honduras on freight, to be paid on the terms above stated, "to make, or cause to be made, for ascertaining the amount of such freight, a measurement of such mahogany, &c. called a freight measurement, and to the said freighter or his agent an account, &c. before payment &c." Averment, that the plaintiff did not, nor would, before, &c. make such measurement, but on the contrary, &c., whereby, &c. Demurrer and joinder.

Per Cur. The point which the defendant's arguments have been employed to establish is, that as the instrument is silent as to the party who is to bear the trouble of measurement and as the custom at Honduras throws it on the plaintiff, the latter is subjected to the condition of rendering an account of such measurement precedent to his right to demand payment of freight. Now it is the established practice, in considering mercantile contracts, to resort to the usage of particular trades to explain the deeds that constitute them; but the defendant, not content with the liberality he had of adducing evidence of such custom on trial, has attempted to decide the case at once by pleading a fact introductory of terms not apparent on the face of the deed, and which could be decided only by a jury.—Judgment must therefore be given for plaintiff. See 2 Marsh. 141.

4. *LANGDEN v. STOKER*. M. T. 1634. K. B. Cro. Car. 383.

This was an action of *assumpsit* upon a contract to go a certain voyage before the month of August. The defendant pleaded that in April, before any breach of the contract, the plaintiff discharged him from it, without showing how, viz., whether by deed or not. The plea was holden good, according to the rule *modo quo dñitur eodem modo dissolvitur*.

5. *THOMSON v. NOEL*. M. T. 1661. C. P. 1 Lev. 16. S. P. *HOLLAND v. HARCOURT*. 1. Bulst. 176

The plaintiff declared on a covenant to ship 280 soldiers, and pay for their carriage to Ireland 5*l.* a man; and assigned for breach, that the defendant had not the 280 men ready, but only 180, which the plaintiff carried to Ireland, but the defendant had not paid for their carriage; and the defendant pleaded that he had the 280 men ready, and offered to ship them, but the plaintiff would not receive them, without answering to the non-payment for the 180 men carried. For this reason judgment was given for the plaintiff, upon demurrer, because the plea was pleaded as an answer to the whole declaration, but was an answer to part only, viz., the charge for not shipping the full number of men, in respect of which the plaintiff claimed general damages; and was no answer to the other claim in the declaration, for the passage money of the number of men actually carried.

5*th.* *Of the evidence.*

Evidence.

Evidence cannot be adduced to control or vary the particular covenants in a charter-party. Therefore, where a ship was chartered to wait for convoy at

A plea to an action on a charter party, alleging a custom which would enure as a bar to the action, is how ever bad.

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Where the defendant relies on a discharge from his covenant, he must plead it specially unless the form of action be *assumpsit*, in which case he may give the fact in evidence under the general issue.

The other rules of pleading are the same as are generally followed in other cases.

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Portsmouth, Lord Kenyon would not suffer a parol agreement to be set up on the other side to substitute Corunna for Portsmouth. (Leslie v. La Torre, cited 12 East. 583. abridged *ante*.) And this doctrine was sustained by the Court of King's Bench in the case of White v. Parkins, 12 East, 578. abridged *ante*, though they held that it did not apply to that particular case.

6th. *Of the damages.**

MARTIN v. EMMOTE. E. T. 1816. Exch. 2 Marsh. 230; S. C. 6 Taunt. 530.

Covenant on a charter-party for a specified sum for freight, and also for damages for the detention of the plaintiff's vessel while unloading, and there- by exceeding the time allowed by the charter-party for that purpose. On judgment being suffered by default, the jury assessed the damages generally on both breaches; and on error it was moved that interest should be allowed: but it was holden, that though interest might have been claimed on the damag- es for the first breach, yet as the jury had assessed them indiscriminately, the Court could not distinguish what sum they had assigned for each breach. See 2 Stark. 45.

Where a jud- ry, in an ac- tion on a charter-par- ty, assessed damages generally; the Court will not al- low inter- est, though the demand arises for special as well as unli- quided da- mages.

(b) *Of their lien; see post, tit. Lien.*

Chastity. See tit. *Divorce; Freebench; Seduction.*

Chattels.

All goods, moveable and immoveable, except such as are in nature of free- hold, or parcel of it, are *chattels*.

Chattels, personal.

Chattels personal are things moveable, which may be annexed to or attend- ant on the person of the owner, and carried about with him. Such are ani- mals, household stuff, money, jewels, corn, garments, and every thing else that can properly be put in motion, and transferred from place to place.

Chattels real.

Chattels real are defined to be things concerning or savouring of the reality^c as terms for years of land, the next presentation to a church, estates by a statu- te merchant, statute staple, or *clegit*, being interests issuing out of or annexed to real estates.

Chance-medley. See tit. *Homicide.*

Cheat. See tits. *Embezzlement; False Pretences; Frauds and Cheats.*

Check. See tits. *Banker; Bills of Exchange, and Promissory Notes; Do- natio Mortis Causa; Gift; Lien.*

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* The amount to be recovered in cases of breaches of the different covenants contained in a charter-party, has been already examined; *vide ante*, p. 307.

I. RELATIVE TO THE FORM.

A check or draft is an order for the payment of money uniformly payable on demand, and usually to bearer; it must be in writing, but no precise form or set of words is essential to its validity; *vide ante*, vol. 4. p. 264.

II. RELATIVE TO THE STAMP.

[394] 1. The 55 Geo. 3. c. 184. exempts from stamp duties all drafts or orders for the payment of money to the bearer on demand, and drawn upon any bank, or person acting as a banker, residing or transacting the business of a banker, within ten miles of the place where such draft or order shall be issued, provided such place shall be specified in such draft or order, and the same shall bear date on or before the day on which the same shall be issued, and provided the same do not direct the payment to be made by bills or promissory notes. See the other clauses of this act, *ante*, vol. 4. p. 302.

Under this 2. CASTLEMAN v. RAY. E. T. 1801. C. P. 2 B. & P. 383. Action for money had and received. Defendant pleaded a set-off as to part, and produced the following paper unstamped, in evidence, to support his plea: Mr. C.

Please to pay the bearer —l.; his receipt will be your discharge from T. M.

Slundgate, 3 Sept. 1790.

Mr. Castleman, Bricklayer, Camberwell.

Paid by R. B. for C.

The defendant objected to this paper being received in evidence, as not falling within the exception as to checks in the 23 Geo. 3. c. 49. Castleman not being a banker. The judge who tried the cause being of that opinion, a verdict was found for the plaintiff, and the court, on motion, refused a rule for a new trial.

3. ALLEN v. KEEVES. E. T. 1801. K. B. 1 East. 435; S. C. 3 Esp. 281. S.

P. WHITWELL v. BENNETT. M. T. 1803. C. P. 3 B. & P. 559. S. P.

And a draft on a banker postdated, and delivered before the day of the date, though not intended to be used till that day, must be stamped, Action against the drawer of a bill of exchange, payable to bearer. Upon the trial it appeared that the bill (which was a common banker's check) was post-dated, having been issued four days previous to the time it bore date, but that it was not intended it should be presented until the day it bore date; when it was urged, that having no stamp annexed to it, it was void. A verdict was, however, recorded for plaintiff, with liberty to the defendant to move to enter a nonsuit, for which purpose a rule nisi had been obtained, and against which cause was now shown. *Per Cur.* The stat. 30 Geo. 3. c. 25. imposes a certain duty upon any bill of exchange, draft, or order, for the payment of money on demand, &c. with a proviso (s. 4.) to except any draft or order for the payment of money to the bearer on demand, bearing date on or before the day on which the same shall be issued, &c. This cause of exemption is express. Besides, if any other construction were allowed, the stamp act would be entirely evaded by drawing bills, and dating them on the day on which they were intended to be payable. Rule absolute.

4. REX v. POOLEY. Sept. Sess. 1800. Old Bailey. 2 Leach, C. L. 887; S. C. 3 B. & P. 311.

[395] So a check on a banker, purporting to be drawn in London, but actually drawn above 10 miles from London on unstamped paper, is not admissible in evidence to

The prisoner was indicted on the 7 Geo. 3. c. 50. s. 1. which makes it a capital felony for any person employed in the post-office to secrete any letter containing a bank note, or any warrant, or draft, &c. for the payment of money. It appeared at the trial that the draft contained in the letter which the prisoner had secreted, was drawn above ten miles from the brokers to whom it was addressed. The prisoner's counsel objected that, as the draft was on unstamped paper, it was not a valid order for the payment of money, and therefore not within the statute on which the prisoner was indicted. This objection was founded on 31 Geo. 3. c. 25. s. 4. which exempts from stamps only such orders for the payment of money as are drawn on a banker residing within ten miles of the place where the order is made; and the 19th section provides that no bill, note, draft, &c. shall be pleaded or given in evidence in any court, or admitted to be good, useful, or available in law or equity, unless they are writ-

ten on paper duly stamped. The point was reserved, and argued in the Ex-chauge a chequer Chamber, when the objections taken on the part of the prisoner were, first, that the draft in question was not an order for the payment of money within the 7 Geo. 3; and secondly, that the indictment which averred that the draft was in force at the time of the secreting, had not been proved, as from want of a stamp, the draft had never been available. The opinion of the judges was not publicly declared, but the prisoner received a pardon. servant of the post-office under the 31 Geo 3, with stealing a draft for the pay ment of money,

Another indictment being framed on the second section of the same statute, which makes it a capital offence for any person to rob any mail or letter or packet, or to steal or take any letter from any mail, or from any place for the receipt of letters, &c. It was objected that the draft before mentioned, being on unstamped paper, could not be received in evidence as a medium to show that the prisoner had stolen the letter. But the court overruled the objection, observing that the draft, though unstamped, might be admitted in evidence for collateral purposes, though not for the purpose of recovering the money mentioned in it; and the evidence was accordingly received. See second point reported; also in 1 East., add. xvii.; and the Ring v. Gillson, 1 Taunt. 25; 1 Phil. Ev. 455. 3d ed.; 3 Stark. Ev. 1382. But such a check may be given in evidence to prove the stealing of the letter in which it was contained.

III. RELATIVE TO THE CAPACITY OF THE CONTRACTING PARTIES.

All persons having legal capacity to contract in general, may draw, and are liable to be sued on, a check or draft; see *ante*, vol. 4. p. 314.

IV. RELATIVE TO THE CONSIDERATION.

(*Vide ante*, vol. 4. p. 325.)

BOEHM v. STERLING. M. T. 1797. K. B. 7 T. R. 423; S. C. 2 Esp.

One M. lent the defendant acceptance for 2444l. at three months, and the defendant gave M. a check upon his banker for the amount, dated 17th February, 1796; the year perhaps intended for 1797. On the 20th of January, M. gave this check to the plaintiff in payment of an old debt. M. died before his acceptance became due, and the defendant was obliged to take it up. In an action upon the check, the defendant urged that as M. could not have sued him upon the check, the plaintiff could not, because he took it so many months after it was dated. Lord Kenyon, C. J. left it to the jury, whether the plaintiff took it *bona fide*, and without knowing the circumstances under which M. held it. They found for the plaintiff: and after argument on a rule for a new trial, the court admitted that it was to be considered as a settled principle, that the person who takes a bill after it is due, is subject to the same equity as the party from whom he takes it, though the bill does not appear upon the face of it to have been dishonoured, and they thought there was no distinction in this respect between checks upon bankers and bills of exchange; but as the defendant had not issued this check until nine months after it was dated, they thought it was not competent to him to object to the time when the plaintiff took it; see Down v. Halling, 4 B. & C. 330. [396] The holder of a banker's check may recover thereon though he did not take it till long after date, and though the party of whom he took it could not have recovered upon it, provided he took it bona fide and for a valuable consideration.

V. RELATIVE TO THE TRANSFER.

Checks are transferable by delivery, so as to vest the legal right to receive the money in the holder; and if taken in the course of business from a stranger the amount may be recovered in an action against the drawer, unless fraud can be proved; 1 D. & R. N. P. 50; 4 B. & C. 330.

VI. RELATIVE TO THE PAYMENT.

(A) WITH REFERENCE TO THE TIME WHEN IT BECOMES DUE.

A check or draft is due immediately on payment being demanded.

(B) WITH REFERENCE TO THE PRESENTMENT.

1. POCKLINGTON v. SILVESTER. T. T. 1816. Cited Chit. on Bills, 274. 6th ed. S. P. APPLETON v. SWEETAPPLE. M. T. 1784. C. P. 2 Taunt. 394. It will suffice to present a check for
This was an action brought by the plaintiff to recover the amount of a check

payment at any time during banking hours on the day after it is received.

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And where a person in London received a check on a London banker in the morning, and lodged it soon after with his banker, and the latter presented it between five and six, and got it marked as a good check, and the next day at noon presented it for payment at the clearing-house, the Court held that there had been no unnecessary delay.

It being the custom among bankers not to pay checks presented by bankers after four o'clock, but mark them for payment next day at the clearing-house.

And it has been held on, that a London banker who receives a check by the post, is not bound

given by the defendants to the plaintiffs. The defendants drew the check on their bankers, Messrs. Mainwaring and Co and delivered it to the plaintiffs at 11 o'clock in the morning, on the 16th of November, 1817, but it was not presented till near five o'clock on the 17th. The banker stopped payment at four o'clock on the 17th of November, and the defendants had notice thereof that evening. At the trial before Gibbs, C. J. he directed a verdict for the plaintiffs, on the ground that they had the whole of the banking hours of the next day to present the check for payment. The jury, however, contrary to the direction of the judge, found for defendants. In the ensuing term the plaintiffs obtained a rule for a new trial; and upon the second trial, before Burroughs, J. he directed a verdict for the plaintiff, saying, that whatever doubts had been formerly entertained, it was now established as a rule of law, that the party receiving a check on a banker has the whole of the banking hours of the next day to present it for payment. The jury found accordingly.

2. ROBSON AND ANOTHER V. BENNETT AND ANOTHER. E. T. 1810. C. P. 2 Taunt. 388.

Assumpsit for goods sold and delivered. The plaintiffs had a verdict, subject to the opinion of the Court on the following case. The defendants being indebted to the plaintiffs for coals, gave to one of them, on the 11th September, a check drawn upon their (the defendants') bankers. The plaintiff did not present it for payment himself, but transferred it to the bankers in the afternoon of that day, who presented it at the defendants' bankers on the same day, between the hours of five and six in the evening. The check, being presented after four o'clock, was not paid, but was marked, as is usual in those cases, for the purpose of its being paid next day at the clearing-house. A clerk to the plaintiffs' bankers, attended there on the 12th for that purpose, but no person on the part of defendants' bankers was present during all that day. The check was returned to the plaintiffs by their bankers dishonoured on that day, and they gave notice of such dishonour on the morning of the 13th to the defendants. The defendants' bankers stopped payment on the morning of the 12th at nine o'clock. It was contended for the defendants that it was incumbent on the plaintiffs to have presented the check on their own account, and having chosen to negotiate it through the hands of a banker, they were bound by their own *laches*. The argument opposed to this was, that the mode adopted by the plaintiffs to obtain payment corresponded with the defendants' mode of discharging their debt; which course being selected by the defendants, was equally open to be pursued by the plaintiffs. *Mansfield, C. J.* The defendants endeavour to prove that because they have given a security, which ultimately has proved invalid, they are discharged from their debt, though it is at the same time shown that the goods purchased have never been paid for. No *laches* can be imputed to the plaintiffs, for the check was presented on the day on which it was drawn, but was rendered null by subsequent occurrences not under the plaintiffs' controul.—Judgment for plaintiff.

3. ROBSON AND ANOTHER V. BENNETT AND ANOTHER. E. T. 1810. C. P. 2 Taunt. 388.

Per. Cur. A rule is observed among bankers not to pay checks presented by other bankers after four o'clock, but to mark them if valid, and they are thereon payable the next day at a place called the clearing-house, where the bankers' clerks meet for that purpose.

4. RICKFORD V. RIDGE. M. T. 1810. N. P. 2 Campbell, 537.

This was an action by plaintiffs, country bankers, to recover back the sum of 300*l.* paid to defendant under the following circumstances. Plaintiffs cashed a check payable in London for defendant, on the 13th June. The plaintiffs did not send off the check by the post on the 13th, but by a coach which started at eight in the morning of the 14th. The parcel was directed to Praeds and Co. Bankers, London, who presented the check for payment on the 15th. It was proved that bankers sent out checks and bills for payment only once a day, and that that takes place previous to the delivery of letters

by the post, therefore it was not presented before the 15th. It was urged that if the check had been sent to town on the 13th, and presented on the 14th, it would have been paid. *Lord Ellenborough, C. J.* said, the holder of a check must use due diligence in presenting it, and give notice of dishonour to those against whom he seeks his remedy. The question of time must be decided by the law merchant, which requires that all checks should be presented in a reasonable time; as where checks are received one day they should be presented the next.—Verdict for plaintiffs.

5. *FERNANDEY V. GLYNN*. Sittings after M. T. 1806. N. P. 1 Camp. 426. n.

Plaintiff paid into the house of A., a banker, a check upon defendant's house. A.'s clerk took it to the clearing-house to be paid, and put it into the defendant's drawer. A.'s clerk received it back before five, with a memorandum written on it, "cancelled by mistake." It appeared the custom was for the clerks to take the checks from the drawers, and send to the respective bankers; and those they do not intend to pay are returned before five o'clock. *Lord Ellenborough* said: notwithstanding the cancelling, the defendant had until five o'clock to return the check, and having done so, it amounted to a refusal to pay.

(C) WITH REFERENCE TO ITS BEING CONSIDERED AS CASH.

See *ante*, vol. iv. p. 448.

(D) WITH REFERENCE TO ITS PRODUCTION BEING EVIDENCE OF PAYMENT.

1. *EGG V. BARNETT*. GENT. T. T. 1800. N. P. 3 Esp. 195.

In answer to an action for work and labour, and goods sold and delivered, the defendant produced two drafts drawn on his bankers in favour of plaintiff, and which had been duly paid; on one of them the name of Egg (the plaintiff) was indorsed, and on the other the name of Wilks, whom the defendant proved to be a person employed by the plaintiff to receive the money. On an objection being taken to this evidence, *Kenyon, C. J.* said: it was good proof of payment, and it remained for the plaintiff to show that there were other transactions to which these drafts were applicable; in this case the name is not merely in the body of the draft, which is, of course, arbitrary, and not to be read in evidence; but here the names of the plaintiff and his agent are written on the back acknowledging the receipt of the money; this is certainly evidence for the jury.

2. *AUBERT V. WALSH AND ANOTHER*. E. T. 1812. C. P. 4 Taunt. 293.

This was an action for money had and received; defence a set-off. The delivery to the plaintiff of several checks drawn by the defendants on their bankers, and paid by them to the plaintiff, was proved. It was contended, however, for the plaintiff, that the mere payment of the checks was not sufficient evidence of a debt to support a set-off, but that it lay on the defendant to show on what account they were paid. The plaintiff had a verdict, and rule nisi to set it aside was subsequently discharged; the court being of opinion that the circumstances under which the check was given ought to have been proved.

VII. REMEDY ON BY ACTION.

An action of special *assumpsit* is the appropriate form of action on a check; debt might be sustained against the maker.

* In *Boehm v. Sterling*, 7 T. R. 425. abridged *ante*, 895. It was admitted, that the rule allowing the party receiving a check not to present it until next day, will not enable a check succession of persons to keep it long in circulation, so as to retain the liability of all the parties, in case the same should be ultimately dishonoured. And in the ordinary course of business a check cannot be circulated or negotiated so as to affect the drawer, who has funds shown in the hands of the bankers, after banker's hours of the day after he first issues it; *Chit. Bills*, 823. 6th. ed.

† And the circumstances of a check being made payable to A., and of A.'s having received payment of it, is not evidence that the maker gave it to him; *Lloyd v. Sandeland*, Gow. N. P. c. 15; see 2 Campb. 439; 4 Esp. 9.

[399] **VIII RELATIVE TO THE BANKER'S RIGHTS AND LIABILITIES.**

The assignees of a bankrupt may recover from a banker money paid by them in obedience to the bankrupt's draft after an act of bankruptcy.

1. VERNON, ASSIGNEE OF TYLER V. HANSON. E. T. 1788. K. B. 2 T. R. 287.

And if a banker pay a cancelled check under circumstances which ought to have excited his suspicion, he does it in his own wrong.*

The plaintiff's, who were the assignees of B., a bankrupt, after having recovered from his bankers the money which they had paid to one A., with full knowledge of B's act of bankruptcy, brought an action for money had and received against A. to recover back the amount of the draft. On motion to set aside the nonsuit, on the ground, that inasmuch as the defendant had received the money of the bankrupt with knowledge of the bankruptcy, he was not entitled to retain it. *Per Cur.* The action cannot be maintained; for although the plaintiffs had at first an election whether they would bring the action against the banker or A., yet having, in the former action against the banker, insisted that the money had not been paid on their account, they cannot, in the present action, be permitted to contradict it, and insist that the payment was made for them and on their account.

2. SCHOLEY V. RAMSBOTTOM AND OTHERS. T. T. 1810. N. P. 2 Campb. 485.

This was an action by plaintiff against the defendants, as his bankers; and the only question was, whether the defendants were entitled to take credit for the sum of 366*l.* paid under the following circumstances: plaintiff drew a check for 366*l.*, but in consequence of there being a mistake in the amount, plaintiff tore it to pieces, and drew another for 360*l.* which was paid; in a short time after the first check for 366*l.* was presented by a stranger for payment, which defendant's clerk also paid. Lord Ellenborough, C. J. held, under the circumstances, that defendants were not justified in paying the check.—Verdict for plaintiff.

3. MARTIN AND OTHERS V. MORGAN AND OTHERS. T. T. 1819. C. P. 3 Moore. 635; S. C. 1 B & B. 289.

But the payee of a banker's check presents it knowing it to be post-dated, and that the drawee is insolvent, and has not nor will have, funds in such banker's hands for its payment, the banker paying such check in ignorance of these circumstances can recover it from the payee as money had and received.†

Assumpsit for money had and received. It appeared that the plaintiffs were bankers to Messrs. B. & V., who were merchants, and employed the defendants as brokers. Messrs. B. & V. being in embarrassed circumstances, requested the defendants to give them pecuniary aid, whereon they accepted two bills, drawn by Messrs. B. & V. and were to retain certain deeds in their possession as security for their responsibility on such their acceptances. Before the bills fell due, Messrs. B. & V. acquainted the defendants with their inability to meet their payments, and the defendants, at Messrs. B. & V.'s desire, accepted new bills to the same amount, Messrs. B. & V. agreeing to obtain cash for them, and pay it to the defendants, in order to discharge their first acceptances. In order to secure the defendants still further, Messrs. B. & V. gave them two post-dated checks, drawn on the plaintiffs, for the amount of the bills. Messrs. B. & V. procured the bills to be discounted, and paid the money into the plaintiff's house to be carried to their account. The defendants having learned that the bills were discounted, applied to Messrs. B. & V. for the proceeds, which being refused, they requested payment of the first check, and were informed that they were unable to pay them, as the money had been appropriated in another channel, but suggested that Messrs. M. would assist them, which they, on inspecting the books, declined, intimating that Messrs. B. & V. were insolvent. The defendants thereon threatened to present the first check, which was the ground of this action, unless they paid it by four o'clock on the day of its date; they, however, presented it by half past three on that day, and received the amount from the plaintiffs, who, though they had no funds of Messrs. B. & V.'s in their hands, paid it for the honor of Messrs. B. & V., and in the expectation of receiving money from them that evening; but, before four o'clock, the plaintiffs had notice from Messrs. B. &

* So if a check has been lost, and the banker pass it before it bears date; *Da Silva v. Fuller*, Chit. Bills. 148. n.

† In general the death of the drawer is a countermand of the banker's authority to pay; yet if the holder, before the banker is apprised of the death, receive the amount, he will not be liable to refund. *Ves. Jun.* 118.

V. not to pay more money on their account. The plaintiffs were ignorant of Messrs. B. & V.'s circumstances, and of their transactions with the defendants, as well as of the facts relative to the dates of the checks. A verdict was found for the defendants, open to a motion on the plaintiffs' part to set it aside. A rule nisi for that purpose being obtained, on the ground that the defendants were acquainted with the insolvency of Messrs. B. & V. and that the plaintiffs had no funds of theirs in their hands, and that the money had been obtained illegally on a post-dated check, and that the plaintiffs were ignorant of their circumstances when they paid the said check.

Per Cur. In this case we must consider the situation of the defendants [401] with the plaintiffs as bankers. If they had paid the check with a knowledge that it was post-dated, they would have subjected themselves to a penalty by stat. 55 Geo. 3. c. 184. s. 13. which imposes such penalty on the drawer, payee, and person paying, knowing the same to be post-dated; but it appears that the defendants were aware of these circumstances, whereas the plaintiffs were not. It has been urged against the plaintiffs, that they are estopped by their voluntary payment, though they had no funds of Messrs. B. & V.; to which it is answered, that they expected to receive funds from them during that day. Now, the defendants, when they presented the check, knew not only that it was concocted in illegality, but also that Messrs. B. & V. had not, nor were likely to have, any funds in the plaintiffs' hands; and, in fact, that Messrs. B. & V. were insolvent; and yet, with a knowledge of these facts, obtained payment before notice could be given to the plaintiffs to discontinue payments on Messrs. B. & V.'s account.—Rule absolute.—See 2 East, 471. n; *ibid.* 469.

IX. RELATIVE TO GIVING A CHECK WHERE THE PARTY HAS NO EFFECTS.

1 REX V. LARA. Dec. Sess. 1794. Old Bailey. 2 Leach, C. L. 647; S. C. T. R. 565.

An indictment stated, that the defendant deceitfully intending, by crafty means and devices, to obtain possession of certain lottery tickets, the property of A., pretended that he wanted to purchase them for a valuable consideration, and delivered to A. a fictitious order, for payment of money, subscribed by him, the defendant, &c., purporting to be a draft upon his banker's for the amount, which he knew he had no authority to draw, and that it would not be paid, but which he falsely represented to be in good order, and that he had the money in the banker's hands, and that it would be paid; by virtue of which he obtained possession of the tickets, and defrauded the prosecutor of the value. The defendant having been convicted, a motion was made in arrest of judgment, which the Court accordingly suspended, observing, that in order to make this case something more than a bare naked lie, it had been said, that the defendant used a false token, for that he gave a check on his banker, but that was only adding another lie; and that if the Court should determine that this case was indictable, they would not know how to draw the line; for it might equally be said, that every person who drew on his banker without having effects there used a false token, and might be indicted for it. It has been admitted in argument, that a mere false assertion, unaccompanied by a recommendation, is not indictable; and we think there is nothing in this case beyond the defendant's own false assertion.—Judgment arrested.

2. REX V. JACKSON. Spring Ass. 1813. 2 Leach. C. L. 656. note; S. C. 3 Campb. 370.

On an indictment on 30 Geo. 2. c. 24. it appeared that the prisoner had obtained property by giving a draft on a banker, and by pretending he had cash there to pay it. The judge who tried the prisoner, said, this point had been recently before all the judges, who were of opinion, that it was an indictable offence fraudulently to obtain goods by giving in payment a check upon a banker with whom the party keeps no cash and which he knows will not be paid.

Check=string. See tit. *Huckney Coach.*

Check=st. See tit. *Tithes.*

A person by giving a draft on a banker with whom he keeps no account was holden not to be guilty of an indictable offence.

But it has been since settled, that a check is a false pretence with in 80 G. 2. c. 24. if given by a person who knows it will not be paid,

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Chemical Discoveries. See *tit.* *Copyright; Patent.*

CHERRIES. See *tit.* *Tithes.*

CHESTER. See *tit.* *Palatine, Counties of*

Chief Justice* and Chief Baron.† See *tit.* *Warrant.*

If the chief justice sue in his own court, the placita must be before the other three judges.‡

WOOD v. THE MAYOR OF LONDON. 1701. Error. 1 Salk. 397.

It was resolved in this case that the Chief Justice of the Common Pleas may bring an action in that court, but then there must be a special entry, viz. *placita coram Johanne Blencore milite*, &c. omitting the Chief Justice, otherwise it would be erroneous.

CHIEF-RENTS. See *tit.* *Rent.*

This term is descriptive of the rents of the freeholders of manors, called, *reditus compitales*; they are also denominated *quit rents*, *quieti reditus*, because thereby the tenant goes quit and free of all other services.

Chief Usher and Crier.

GREEN v. HEWENT. T. T. 1793. Peake. K. B. N. P. 182.

The chief usher and crier of the [403] K. B. exercises his office by two deputy ushers and two deputy criers, who are deemed distinct and independent officers.

This was an action for money had and received, and involved the plaintiff's right to the office of Usher and Crier of the K. B., which he claimed, as the grantee of the crown. The defendant admitted the plaintiff's right, but claimed the office of Under Usher as an independent and distinct office from that of the chief usher and crier.

Several patents were produced; and by one dated 25 Geo. 3. the reversion of the office of Usher and Crier of the K. B. after the death of J. C. was granted to J. D., and the next reversion to M. R.: J. C. being possessed of the office, and M. R. being entitled to the reversion, they by deed appointed the defendant one of the deputy-ushers of the court, to hold and exercise the office of a deputy-usher of the said court, in all things which to that office only belong, so long as he should live, and to take all wages, fees, and regards, which belong to the office of deputy-usher. It contained another proviso, that J. C. and M. R. could not warrant his holding the office longer than they or the survivor of them should live. Subsequently M. R. died, and the plaintiff proved a grant of the reversion of the office to him, and to have, occupy, and enjoy, and exercise the said office unto him, the said plaintiff, by himself or his sufficient deputy or deputies, with all and singular fees, wages, &c. accustomed to be paid. The plaintiff appointed four deputy's fees. For the defendant it was argued that the office of Chief Crier and Under Crier were distinct and different offices. *Per Lord Kenyon C. J.* This is a good form of action to try the plaintiff's title to the office; but it is incumbent on him to show that he is entitled to the fees which the defendant has received. But what proof has been given in this that any fees belonging to the Usher of the K. B. have been received by the present defendant? In many cases the office of the deputy depends on the office of his principal, and ceases with it, but not always. It has been in this case assumed, though not proved, that the Under Ushers are more deputies of the Chief Usher. If the word deputy is used in the patent, instead of the Under Usher, it will not affect the case, if it appear from the nature of the office that he is an independent officer. On the whole, I am

* The chief justice is appointed by writ, and continues in office during good behaviour, notwithstanding any demise of the crown (which formerly vacated the appointment), and by the 7 Geo. 4. he is to receive a fixed salary of 10,000*l.*; anciently his income was chiefly derived from fees and the sale of several offices; see 12 & 13 W. 3. c. 2; 1 Geo. 3. c. 23.

† The chief baron is created by letters patent, and was formerly a peer of the realm; he is removable for misbehaviour, and receives by the 7 Geo. 4 a salary of 8000*l.* per annum.

‡ The judges have the privilege of suing and being sued in their own court: see 3 Leon. 149. 56.

§ Holds his place for two lives by letters patent under the great seal; see 27 Geo. 2. c. 17.

of opinion that this action cannot be sustained, since the defendant must be considered an officer independent of the plaintiff.—Plaintiff nonsuited.

CHILDREN. See tit. *Distribution, Statute of; Parent and Child; School and Schoolmaster.*

CHILD-STEALING. See tit. *Kidnapping.*

CHIMNEY MONEY.

Chimney-money, otherwise called hearth-money, was a duty to the Crown imposed by 14 Car. 2. c. 2. of 2s. for every hearth in a house. This statute is now repealed.

CHIMNEY-SWEEPER.

By 38 Geo. 3. c. 48. s. 1. churchwardens and overseers, with the consent of two justices, are empowered to bind boys of eight years old and upwards, and who themselves or their parents are chargeable to the parish, or who shall beg, or with the consent of their parents, as apprentices to chimney-sweepers until they are sixteen years old.

By s. 4. the form of the indenture is pointed out and given in a schedule annexed to the statute. In that the master covenants to find the boy decent clothing, to permit him to attend public worship, and to observe the statute in the several particulars mentioned. All other indentures and agreements are declared void, and any chimney-sweeper keeping an apprentice under eight years of age is to forfeit not more than 10*l.* nor less than 5*l.* for each.

By s. 6. one justice is authorised to settle all complaints of ill usage by the masters, or ill behaviour in boys.

By s. 7. no chimney-sweeper shall keep more than six apprentices at once; the master's name and place of abode are to be inscribed on a brass plate in the front of a leathern cap, to be provided by the master for each apprentice, to be worn by the boy when on duty. For every apprentice above six, and for neglecting to provide their caps, the master is to forfeit not exceeding 10*l.* nor less than 5*l.*

By s. 8. if the master shall misuse or evil treat his apprentice, or be guilty of the breach of any of the covenants in his indenture, he shall forfeit not more than 10*l.* or less than 5*l.*

And by s. 9. no chimney-sweeper shall hire out or lend his apprentices to any other person, nor cause them to call in the streets before 7 a. m. or after 12 at noon between Michaelmas and Lady-day, or before 5 a. m. nor after 12 at noon between Lady-day and Michaelmas, on penalty of not less than 5*l.* nor more than 10*l.*

CHIROGRAPH. See tit. *Fine.*

CHOSE IN ACTION.* See tits. *Bills of Exchange*, vol. iv. p. 254; *Bond* vol. iv. p. 630; *Insolvent Debtors; Composition with Creditors; Covenant; Replevin; Set-off.*

1. *TATLOCK v. HARRIS.* E. T. 1789. K. B. 3 T. R. 182.

The Court, in giving judgment in this case, said: we do not mean to infringe a law which is very properly settled, that a chose in action cannot be transferred.

Though a chose in action cannot be assigned at law,

* This term has, in a note to a prior vol. (*ante*, vol. iv. p. 254. n.) been defined to mean the legal interest possessed by a party in a contract or right, which, in case of opposition, cannot be reduced into beneficial enjoyment without an action or suit. The assignment or transfer of these inchoate or intangible interests have been, from the remotest periods, interdicted. Indeed, so anxious were the earliest legislators to prevent the alienations of choses in action, that it was enacted by the 32 Hen. 8. c. 9. that no person shall buy or sell, or obtain any right or title to, any lands or hereditaments, unless the person contracting to sell, or his ancestor, had been in possession of the same for the space of one year before the contract; see 460. 2. b. a.; Plow. 88; 3 T. R. 88; 1 H. Bl. 30. This doctrine, at its origin, appears only to have applied to landed estates; but it is evident, that even at a very early period, the same rule was observed, as to the assignment of mere personal chattels not in possession. Lord Coke (Co. Lit. 214. n.) says, it is one of the

[405] DELANY v. STODDART. M. T. 1785. K. B. 1 T. R. 26. S. P. JOHNSON v. COLLINGS. M. T. 1800. K. B. 1 East. 103.

It may in equity, and the courts of law will permit the assignee to sue in the assignor's name. *Per Ashhurst, J.* Though a chose in action cannot in law be assigned, yet in equity it may; therefore, the courts of law will permit the assignee to sue in the assignor's name.

3. HOWELL v. M'IVERS. E. T. 1792. K. B. 4 T. R. 690. S. P. HEATH v. HALL. E. T. 1812. C. P. 4 Taunt. 326.

To an action on a contract by A., B., & C., the defendant pleaded the bankruptcy of A., and the plaintiffs replied, *that A. had assigned his interest* to them. On demurrer, assigning for cause that the replication ought to have shown the assignment to have been by deed; it was answered by counsel, and assented to by the Court, that the assignment need not be by deed.

4. MOUSDAL V. BIRCHALL. E. T. 1771. C. P. 2 Blac. 820.

And as *sumpsit* brought an action against Mousdale, stating in his declaration, that one P. A. was indebted to him in 5*l.* 1*s.* 10*d.* for goods and merchandize; but the exact amount thereof at the time of the contract, on which this action was brought, was unknown both to the plaintiff and the defendant; and that Birchall had sold, and Mousdale had bought the said debt, be it more or less, for its whole amount, except 10*l.* which Mousdale was to have for taking upon him the said debt; and that Birchall was to receive certain cabinet-maker's goods therein specified, to the amount of 38*l.* 14*s.* in part of payment; and the residue, except as aforesaid, in other cabinet-makers' goods to the value thereof; and for non-delivery of these goods the action was brought. To this the defendant demurred; and on the plaintiff joining in demurrer, judgment was given for the plaintiff; and the defendant now brought his writ of error. After argument, and full deliberation, the Court were clear, that the consideration was a good one, although the debt at the time of the assignment was uncertain.

[406] This was a writ of error from the King's Bench. The defendant in error brought an action against Mousdale, stating in his declaration, that one P. A. was indebted to him in 5*l.* 1*s.* 10*d.* for goods and merchandize; but the exact amount thereof at the time of the contract, on which this action was brought, was unknown both to the plaintiff and the defendant; and that Birchall had sold, and Mousdale had bought the said debt, be it more or less, for its whole amount, except 10*l.* which Mousdale was to have for taking upon him the said debt; and that Birchall was to receive certain cabinet-maker's goods therein specified, to the amount of 38*l.* 14*s.* in part of payment; and the residue, except as aforesaid, in other cabinet-makers' goods to the value thereof; and for non-delivery of these goods the action was brought. To this the defendant demurred; and on the plaintiff joining in demurrer, judgment was given for the plaintiff; and the defendant now brought his writ of error. After argument, and full deliberation, the Court were clear, that the consideration was a good one, although the debt at the time of the assignment was uncertain.

Christmas Day. See *tit. Bills and Notes; Holiday.*

Christian Name. See *tit. Abatement; Bail; Misnomer.*

Christianity.† See *tit. Blasphemy.*

1. TAYLOR'S CASE. H. T. 1675. K. B. 1 Vent. 293; S. C. 3 Keb. 607.

To impugn in an indecorous manner the christian religion is an offence; This was an information against Taylor for asserting that Jesus Christ was a bastard, a whoremaster, that religion was a cheat, and that he neither feared God, the devil nor man. At the trial, Hale, C. J. said, such kind of wicked blasphemous words, were not only an offence to God and religion, but a crime against the laws and government, and therefore punishable in this court; that to say religion is a cheat, is to dissolve all those obligations whereby civil society is preserved.

maxims of the common law, that no right of action can be transferred, "because, under colour thereof, pretended titles might be granted to great men, whereby right might be trodden down, and the weak oppressed, which the common law forbiddeth." The prominent exception of bills of exchange and promissory notes to the rule, interdicting the transfer of interests in choses in actions (*ante*, vol. iv. p. 254—5), and the more qualified exception as to bonds (*ante*, vol. iv. p. 680. and note) have been already noticed and explained; the other exceptions arise in the case of Bankrupts, Insolvency, Replevin, and Bail Bonds. For the law respecting the assignment of these interests and instruments, see those titles.

* For an assignment of a chose in action has always been deemed a sufficient consideration for a promise; see 1 Rol. Abr. 29; Sid. 212; T. Jones, 222; 1 Salk. 25.

† Converting the christian religion into contempt and ridicule is an indictable offence; see 1 Hawk. P. C. b. 5; 1 East, P. C. 3; 3 Keb. 607; Wooddes, 512. Formerly it was only cognizable by the ecclesiastical courts, but now it is punishable in the civil courts by fine and imprisonment; and by the 9 & 10 W. 3. c. 32. it is enacted, that if any person educated in, or having made profession of, the christian religion, shall by writing, printing, preaching, or advised speaking, deny the christian religion to be true, or the holy scriptures to be of divine authority, he shall on the first offence be rendered incapable of bringing an action, being guardian, executor, legatee, or purchaser of lands, and shall suffer three years' imprisonment without bail.

2. **REX v. WOOLSTON.** E. T. 1717. K. B. Barn. 162; S. C. 2 Stra. 334. S.P. Christianity being part of the law of the land.
REX v. BOSWORTH. T. T. 1730. K.B. 2 Stra. 1113.

The defendant was convicted for his blasphemous discourses on the miracles of our Saviour. On a motion in arrest of judgment, that this was not an offence within the cognizance of the temporal courts at common law, the Court declared they would not suffer it to be debated; observing, that the christian religion, as established in this kingdom, is part of the law; and that, therefore, whoever derided christianity derided the law, and consequently must be an offence against the law.

3. **REX v. WOOLSTON.** Fitzgibbon, 66.

In the preceding case it was also moved, in arrest of judgment, that as the intent of the book was only to show that the miracles of Jesus Christ were not to be taken in their literal sense, it could not be considered as attacking christianity in general, but only as striking against one received proof of his being Court will the Messiah; to which the Court replied, that an attack on christianity in the way in which it was attacked in the publication in question was destroying the very foundation of it, and therefore an offence at law. But that the rule did not extend to disputes between learned men upon particular controverted points. The defendant was fined and imprisoned.

But al though deri ding the christian faith is pun ishable, the [407] not inter fere with mere differ ences of o pinion on disputed points.†

Chronometer. See tit. *Infant*.

Chronology. See tit. *Copyright*.

Churches and Chapels. See tits. Advowson, Blasphemy, Burial, Ecclesiastical persons, Induction, Monuments, Parish, Pews, Vestry.

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† Provided the opinions are rationally and dispassionately expressed; see 4 Bla. Com. 51. And in the case of *Rex v. Williams*, cited Holt on Libel, 69, note, where the defendant had been convicted of having published a very impious libel called *Paine's Age of Reason*, Ashburt, J. in pronouncing judgment, said, that although the Almighty did not require the aid of human tribunals to vindicate his precepts, it was, nevertheless, fit to show our abhorrence of such wicked doctrines as were not only an offence against God, but against all law and government, from their direct tendency to dissolve all the bonds and obligations of civil society; and that it was upon this ground that the christian religion constituted part of the law of the land. That if the name of our Redeemer was suffered to be traduced, and his holy religion treated with contempt, the solemnity of an oath, on which the due administration of justice depended, would be destroyed, and the law be stripped of one of its principal sanctions—the dread of future punishments; see *ante*, vol. iv. p. 578. If anti-christian publications be seized under an execution, the Court will not direct their sale; 1 D. & R. 474.

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I. AS TO CHURCHES.*

(A) RELATIVE TO THE MANNER OF FOUNDING.

The ancient manner of erecting churches was, for the founders to make an application to the bishop of the diocese, and to obtain his licence. The bishop, or his commissioners, having set up a cross, the founders were allowed to proceed in the building of the edifice; and when finished the bishop consecrated it, but not till it was endowed, and before which the sacraments were not to be administered; see Degge, part 1. c. 12. But by the common law, although the law takes no notice of it as a sacred building till consecrated by the bishop, which is the reason why church or no church, &c. is to be tried and certified by the bishop. And, in some cases, though a church has been consecrated, it must be re-consecrated, as in case any murder, adultery, or fornication be committed in it, whereby it is defiled; or if the church be destroyed, &c.

* A church is a temple or a building consecrated to the honour of God and religion. These edifices were anciently dedicated to some saint, whose name they bore; or a church may be defined to be an assembly of persons united by the profession of the same christian faith met together for religious worship. A church, to be adjudged such in law, must have administration of the sacraments and sepulture annexed to it. If the king found a place of this description, he may exempt it from the ordinary's jurisdiction; but it is otherwise in case of a subject. Such an edifice is either a major, as a cathedral, or minor, as a parish church; see Lind. 9. The cathedral is the see of the bishop; *Leges episcopi*; see 2 And. 168; and cannot be conveyed to another without the bishop; see 2 And. 168. About the year 700, the Saxons in large districts founded churches for themselves and their tenants, which were the original of parish churches; *Lel. de Dei. 259. s. 9. s. 4.* Within those districts other churches were afterwards erected, which in process of time have obtained tithes, burial, and baptism, and thereby become parish churches; *Lel. de Dei. 262. c. 9. s. 24.* And, therefore, every church having burial, and tithes, is now esteemed a parish church; *Lela, de Dei. 266. c. 9. s. 4.*

The usual manner now of erecting churches is by act of parliament, appointing commissioners, who superintend the building, &c. and are authorized to raise money for the purpose, in the mode directed by the particular act; see 58 Geo. 3. c. 45; 58 Geo. 3. c. 134; 3 Geo. 4. c. 72; 5 Geo. 4. c. 103.

(B) RELATIVE TO BUILDING CHURCHES, &c. IN ENGLAND AND IRELAND.

See 58 Geo. 3. c. 45; 59 Geo. 3. c. 134; 3 Geo. 4. c. 72; 5 Geo. 4. c. 103. [410]

(C) RELATIVE TO THE CONSECRATION.

(a) *When necessary*

The law does not recognize churches or chapels till they are consecrated by the bishop; but the canon law supposes that, with consent of the bishop, divine service may be performed, and sacraments administered, in churches and chapels not consecrated; inasmuch as it provides, that a church shall have the privilege of immunity in which the divine mysteries are celebrated, although it be not consecrated; and there are many licenses to that effect (granted on special occasions), in our ecclesiastical records; Gibs. 190. After a new church is erected, it cannot be consecrated without a competent endowment. The 16th canon of the council of London directs that a church shall not be consecrated until necessary provision be made for the priest; and the canon law goes further, requiring the endowment not only to be made before the consecration, but even to be ascertained and exhibited before the founders begin to build. And the civil law is yet more strict, enjoining, that the endowment be actually made before the building be commenced, Gibs. 189. These endowments were commonly made by an allotment of manse and glebe by the lord of the manor, who thereby became patron of the church: see Ken. Par. Ant. 222. 223.

(b) *Time of.*

The consecration of churches may be performed indifferently on any day, for it has been on a Saturday; Gibs. 189; though it ought to be performed during the time of divine service; see Gibs. 189.

(c) *Mode of consecration, and form of.* As to the forms, see 1 Burn, E. L. 325. to 341.

Every bishop may exercise his own discretion as to the mode of consecrating churches and chapels. And by the 21 H. 8. c. 13. limiting the number of chaplains, it is there assigned as a reason why a bishop may retain six chaplains, because that number are requisite in the consecration.

(D) RELATIVE TO THE CHANCEL.*

CLIFFORD V. WICKS AND TOWNSEND. E. T. 1818 K. B. 1 B. & A. 498.

The question raised in this case was, whether a grant of part of the chancel of a church by the rector and patrons of the church to A., his heirs and assigns, was valid in law; and whether such grantee, or those claiming under him, could maintain trespass for pulling down his or their pews there erected. The court said: the general rule is, that the rector is entitled to the principal pew in the chancel, but that the ordinary may grant permission to other persons to have pews there. If this grant, however, were good, it would take the chancel entirely out of the jurisdiction of the ordinary. The policy of the law, besides, is, that the seats should be reserved for the use of the parishioners, and not of strangers. Now this is a feoffment to the party and his heirs, and it is not necessary that they should be resident in the parish; from which it follows, that if we uphold this grant, and decide that the rector has the power of alienating, he might alienate the whole, or part, to the inhabitants of a different parish, and parishioners might thence be excluded from the chancel, and, perhaps, ultimately, from the increase of population, wholly deprived of their right of sitting in the church. Such a right being obviously against the policy

* This is part of the choir between the altar and the communion table, and the rail or balustrade that encloses the place where the minister stands at the celebration of the communion. The chancel is also the eastern part of the church, where the altar is placed; Gibbs. 299.

† For as concerns the body of the church the ordinary is to place and displace; in the chancel, the freehold is in the parson, and is parcel of his glebe; see Bro. and Goldsb. Rep. 45.

A lay impropriator has no power to alienate in fee any part of the chancel of a church.† [411]

of the law, and productive of great inconvenience, we must give judgment for defendant. See 1 T. R. 428; 12 Coke, 105; 2 Roll. Rep. 139; Cro. Jac. 604; 2 Keb. 92; 1 Sid. 88. 361.; Rep. 45; 2 Bulst. 352; 2 Mod. 257; 5 T. R. 298; 1 Phill. Rep. 316; Gibson's Codes, 221. 224; 81 H. 8. c. 13. s. 4.

(E) RELATIVE TO THE AISLE.

The word aisle is derived from the term *nave* or *nat*, a Saxon expression signifying the middle of a wheel, being that part into which the spokes are fixed, and is from thence transferred to signify the body or middle part of the church.

An aisle in a church which has time out of mind belonged to a particular house, and been maintained and repaired by the owner of such dwelling-house, is part of his frank tenement, and the ordinary cannot dispose of it, or intermeddle in it. The reason for this rule is the prescriptive liability to repair, because it is from thence presumed that the aisle was erected by the possessor of the estate, with the assent of the parson, patron, and ordinary. See 12 Co. 105; Gibs. 197. But if he has only used to sit and bury in the aisle, and not repaired it, he gains no property therein; for it is then repaired at the charge of the parish, and vests in the ordinary. Gibs. 197. Nor can a title be obtained, either by prescription, or by a grant from the ordinary to a man and his heirs since the aisle is always supposed to be held in respect of the house. See 12 Co. 106; 2 Keb. 92; 2 Buls. 1150; 1 Sid. 88. And when any person has a good title to the aisle, if the ordinary wrongfully place another therein, he subjects himself to an action on the case. See Wats. c. 39,

(F) RELATIVE TO THE PUTTING UP, AND ORNAMENTS IN THE CHURCH.

(a) *In general.*

The communion table may be removed by a majority of the parishioners in vestry, since the majority bind the parish.

By 1 Eliz. c. 2. such ornaments of the church, and of the ministers thereof, shall be retained, and be used, as was in the church of England, by authority of parliament, in the second year of the reign of king Edward the Sixth, until other order shall be therein taken by the authority of the queen's majesty, with the advice of her commissioners, appointed and authorised under the great seal of England, for causes ecclesiastical, or of the metropolitan of this realm; sec. 25. Pursuant to this clause, the queen, in the third year of her reign, granted a commission to the archbishop and bishops of London, Dr. Bill and Dr. Haddon, to reform the disorders of chancels, and to add to the ornaments of them, by ordering the commandments to be placed at the east end. Gibs. 201. Such ornaments of the church, and of the ministers thereof, at all times of their ministration, shall be retained, and be in use, as were in this church of England, by authority of parliament, in the second year of the reign of king Edward the Sixth. The archdeacons shall take care that the clothes of the altar be decent and in good order; that the church have fit books both for singing and reading, and at least two sacerdotal vestments. Lind. 52. The law allows the ecclesiastical court to have consueance in this case, of providing decent ornaments for the celebration of divine service. 2 Inst. 489. And by 3 Carr. 85. the churchwardens or questmen shall take care that all things in the church be kept in such an orderly and decent sort, without dust, or any thing that may be either noisome or unseemly, as best becometh the house of God, and is prescribed in an homily to that effect.

(b) *In particular.*

1st. *Of the communion table.**

NEWSON V. BAWLDREY. M. T. 1702. K. B. 7 Mod. Rep. 70; S. C. Sett. and Rem. 259.

* By the 82d canon, whereas we have no doubt but that in all churches within the realm of England, convenient and decent tables are provided and placed for the celebration of the holy communion; we appoint that the same tables shall from time to time be kept and repaired in sufficient and seemly manner, and covered in time of divine service with a carpet of silk or other decent stuff, thought meet by the ordinary of the place (if any question be made of it,) and with a fair linen cloth at the time of the ministration, as becomes that table, and so stand, saving when the said holy communion is to be administered. At which time the same shall be placed in so good sort within the church or chancel, as thereby the minister may be more conveniently heard of the communicants in his prayer and ministration, and the communicants also more conveniently and in more number may communicate with the said minister. And also this to be done at the charge of the parish.

The plaintiff declared in a prohibition for libelling in the spiritual court, for the payment of a parish rate, made at an assembly of 20 parishioners, fifteen whereof were against the rate, and five only for it; and that the money was expended in repairing the chancel and railing it in, and raising the floor some steps higher, to which it was pleaded, that the communion table was, anciently, placed in the chancel, and that there were ancient rails about it, which were out of repair; that at a meeting of a majority of the parishioners, a rate was made to replace the communion table in the chancel, and to repair the rails. The questions therefore were, 1st, Whether, if the communion table was not in the chancel before, or if there were no steps up to it, and the parishioners, on a meeting, find it improper, the majority of them can make a rate to oblige the rest to contribute to the altering of the place or carrying it into the chancel, or for raising it higher? The court inclined they could; for as to the degrees of order and decency, there is no rule, but as the parishioners agree among themselves; and though they are compellable to put things in decent order, yet there is no other rule for the degrees of decency than the judgment of the majority. 2dly, Whether the majority of the parishioners may bind the rest for repairing or adorning the chancel? for that is a special freehold belonging to the parson. The counsel quoted the case of *Rose v. Hawkins*, 9 W. 3. in this court, where a libel was for a parish rate to repair a church and chancel, and a prohibition was granted for two reasons; one, because the chancel ought to be repaired by the parson; the other, for that it was suggested, the rate was not made by a majority; yet because they had not gone to try that point below. the court said it was no cause.

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2d. Of the pulpit.

Formerly the bishops preached standing upon the steps of the altar. See Ayl. Par. 21. Afterwards it was found more convenient to have pulpits erected for that purpose. Ibid. And by the 83d canon the churchwardens or questmen, at the common charge of the parishioners, in every church shall provide a decent pulpit, to be set in a convenient place within the same, under the direction of the ordinary of the place.

3d. Of the reading-desk.

By the 82d canon a convenient seat shall be made at the charge of the parish, for the minister to read service in.

4th. Of the surplice.

The 58th canon directs every minister saying the public prayers, or ministering the sacraments or other rites of the church, shall wear a decent surplice with sleeves, to be provided at the charge of the parish. And if any question arise touching the matter or decency thereof, the same be decided by the ordinary.

5th. Of the font.

The 81st canon appoints that there shall be a font of stone in every church and chapel where baptism is to be ministered; the same to be set in the ancient usual place. In which font only the minister shall baptise publicly.

6th. Of the chest for alms.

In an act passed in the 27th H. 8. for punishment of sturdy vagabonds, it was enacted, that money collected for the poor should be kept in the common coffer, or box, standing in the church of every parish. And by the 84th canon the churchwardens shall provide and have, within three months after the publishing of these constitutions, a strong chest, with a hole in the upper part thereof, to be provided at the charge of the parish (if there be none such already provided) having three keys: of which one shall remain in the custody of the parson, vicar, or curate, and the other two in the custody of the churchwardens for the time being; which chest they shall set and fasten in the most convenient place, to the intent the parishioners may put into it their alms for their poor neighbours. And the parson, vicar, or curate, shall diligently, from time to time, and especially when men make their testaments, call upon, exhort and move their neighbors, to confer and give, as they may well spare, to the said chest, declaring unto them, that whereas heretofore they have been

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diligent to bestow much substance otherwise than God commanded, upon superstitious uses, now they ought at this time to be much more ready to help the poor and needy, knowing that to relieve the poor is a sacrifice which pleases God; and that also, whatsoever is given for their comfort, is given to Christ himself, and is so accepted of him, that he will mercifully reward the same. The which alms and devotion of the people, the keepers of the keys shall yearly, quarterly, or oftener (as need requires), take out of the chest, and distribute the same in the presence of the most of the parish, or of six of the chief of them, to be truly and faithfully delivered to their most poor and needy neighbours.

7th. Of the basin for offertory.

Whilst the sentences of the offertory are in reading, the deacons, churchwardens, or other fit person appointed for that purpose, shall receive the alms for the poor, and other devotions of the people, in a decent basin to be provided by the parish for that purpose. This offertory was anciently an oblation for the use of the priest, but at the reformation it was changed into alms for the poor. See Ayl. Par. 394.

8th. Of the chalice and other vessels for the communion.

By the 20th canon, the churchwarden, against the time of every communion, shall, at the charge of the parish, with the advice and direction of the minister, provide a sufficient quantity of fine bread, and of good and wholesome wine, which wine we require to be brought to the communion table in a clean and sweet standing pot, or stoop of pewter, if not of purer metal. The parishioners shall find at their own charge the *chalice* or *cup* for the wine; see Lind. 252; which, although expressed in the singular number, is not intended to exclude more than one where more are necessary. See Lind. 252.

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9th. Of the bells.

The parishioners at their own charge shall find bells and ropes. See Lind. 252.

10th. Of the bier.

The parishioners shall find at their own charge a bier for the dead; see Lind. 252.

11th. Of the bible and prayer-book.

By the 80th canon, the churchwardens shall provide a bible of the largest size, at the charge of the parish; see Gibs. 202. And, by the same canon, the churchwardens or questmen of every church and chapel shall, at the charge of the parish, provide the book of common prayer, lately explained on some few points by his majesty's authority, according to the laws, and his majesty's prerogative on that behalf, and that withal convenient speed, but at the farthest within two months after the publishing of these our constitutions; on pain of 3*l.* a month for so long time as they shall be unprovided; the penalties are imposed by the 13 & 14 Car. 2. c. 4. s. 2.

12. Of the books of homilies.

By the 80th canon, the churchwardens shall provide the book of homilies at the charge of the parish.

13th. Of the register book.

By canon 17, in every parish church and chapel shall be provided one parchment book, at the charge of the parish, wherein shall be written the day and year of every christening, wedding, and burial, within the parish; and for the safe keeping thereof, the churchwardens, at the charge of the parish, shall provide one sure coffer, with three locks and keys, whereof one is to remain with the minister, and the other two with the churchwardens severally. And by the 26 Geo. 2. c. 33. the churchwardens shall provide proper books of vellum, or good and durable paper, in which all *marriages* and *banns of marriage* respectively there published or solemnized, shall be registered, to be carefully kept and preserved for public use.

14th. Of the table of degrees.

By the 99th canon, the table of degrees of marriages prohibited shall be in every church publicly set up, at the charge of the parish.

15th. *Of the ten commandments.*

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By the 99th canon, the ten commandments shall be set, at the charge of the parish, on the east end of every church and chapel, where the people may best see and read the same.

16th. *Of the monuments.* See tit. Monument.17th. *Of the images.*

If any images in a window or an aisle be unlawfully broken, the offender shall be punished; see Cro. Jac. 366.

18th. *Of the organ.*

BUTTERWORTH v. WALKER. E. T. 1765. K. B. 3 Burr. 1689.

On showing cause against a prohibition to stop the Prerogative Court of York from proceeding to grant a faculty for an organ in the church of Hali-fax: it appeared, that the cause below was for obtaining a faculty for it; and there was a citation of the parishioners and inhabitants to appear, and to "show cause why an organ should not be erected in their parish church." They did so; and their objection was, "That the plaintiffs below had not the consent of the parish." The answer was, "but we have the consent of the churchwardens; and there is also so large a subscription for erecting and maintaining it, that it will never be chargeable to the parish." And they also allege the consent of a select meeting or vestry. The other side deny that the parish in general is bound by the consent of this select meeting or vestry. Whereupon the applicants for the faculty allege, "that for 20, 30, or 40 years, it has been usual to collect the sense and consent of the parishioners about all parochial matters, at such select meetings or vestries; and that the whole parish are, and for all the time alleged have been, bound by the acts and consent of such meetings or vestries." Upon which, these parishioners, who opposed the organ, moved for a prohibition. The Court observed, that the very ground of applying for the faculty is, "That the parish are not to be burthened with the expence of this organ;" the very condition of praying it is, "That it is to be maintained by a subscription." The counsel for the prohibition said, that no matter of splendour or ornament in the church can be done without the consent of the parish. But the Court said: the consent of the whole parish cannot be essentially necessary to the ordinary's setting up an organ; nor would the parish be bound to repair it, when set up. Now if the consent of the parish is not necessary, then all these proceedings below are nugatory.

The consent of the parish is not essentially necessary to the ordinary's setting out."

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(c) *In whom the property in the ornaments vests.*

STARKY v. THE CHURCHWARDENS OF WATLINGTON. T. T. 1691. K. B. 2 Salk. 547.

The property in what vests in the church vests in the churchwardens,†

A suit was prosecuted in the Spiritual Court for taking away two bells out of the steeple, and a prohibition was granted; for the churchwarden is a corporation, and the property is in him, and he may bring *trover* at common law for the recovery of the same.

* In the case of the churchwardens of St. John's, Margate, v. the Parish, Vicar, &c. of the same, 1 Hagg. 198. Lord Stowell declared, that the law respecting church ornaments is now generally understood. The consent of the parishioners is not indispensably necessary, unless to charge the parish with the support of the ornaments. But if there is no charge incurred, the approbation of the majority of the parishioners is not necessary, nor the disapprobation binding on the ordinary. He, therefore, decreed a faculty for erecting and accepting an organ offered to the parish without a clause against future expences being charged to the parish. And he further observed, in cathedrals, organs may be deemed necessary, and the ordinary may compel their erection by the dean and chapter. In the parish churches it is otherwise.

† Therefore, if a man erect a pew in a church, or hang up a bell in the steeple, they thereby become church goods (though they are not expressly given to the church), and he cannot afterwards remove them; and if he does, the churchwardens may sue him.

The soil and freehold of the church and churchyard is in the parson; but the fee-simple of the glebe is in obedience; 1 Inst. 341. And if the walls, windows, or doors of the church be broken by any person, or the trees in the churchyard be cut down, or grass there be eaten up by a stranger, the incumbent of the rectory (or his tenant if they be let) may have an action for damages; Wats. c. 39. But the goods of the church do not belong to the incumbent, but to the parishioners; and if they be taken away, or broken, the right of action is vested in the churchwardens; Wats. c. 89. As in the case of Bucksal, T. 12. J.

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An indictment on the 4 Geo. 2. c. 32. for stealing in a church is good, without stating in whom the property or the freehold of the church is vested; and if the ownership be improperly laid, it may be rejected as surplusage.

(G) RELATIVE TO THE FREEHOLD OF THE CHURCH.*
REX v. HICKMAN. May Sess. 1784. Old Bailey. 1 Leach. C. L. 593; S. C. 2 East. P. C. 593. S. P. *Ex parte* Parker, 1 Leach. C. L.

The first count of an indictment was for stealing lead "belonging to the C. G., clerk, then and there fixed to a certain building called Hendon church;" the second count stated the lead as "belonging to J. B. and R. M. the churchwardens;" and the third stated it as "belonging to the inhabitants and parishioners." But the majority of the judges held, that the first count of the indictment, which laid the property of the lead to be in the vicar, was good. Many of them however thought, that it would have been better to have alleged that the lead was "fixed to a certain building, being the parish church, &c." without stating the property to be in any one; and Buller, J. thought that charging it to be the property was absurd and repugnant, and that the allegation as to property in that indictment might be rejected as surplusage. See 1 Hale, 512; 3 Campb. 264; 2 East, P. C. 651.

(H) RELATIVE TO THE UNION OF CHURCHES. See *ante*, vol. i. tit. Advowson, p. 321 to 325.

(I) RELATIVE TO THE CELEBRATION OF MARRIAGES. See tit. *post*, Marriage.

(J) RELATIVE TO RINGING THE BELLS.

By the 88th canon, the churchwardens or questmen, and their assistants, shall not suffer the bells to be rung superstitiously upon holidays or eves abrogated by the book of common prayer, nor at any other times, without good cause, to be allowed by the minister of the place, and by themselves. By can. 111. the churchwardens shall present all persons, who by untimely ringing of bells, do hinder the minister or preacher. By can. 15. upon Wednesdays and Fridays, weekly, the minister, at the accustomed hours of service, shall resort to the church or chapel; and warning being given to the people by tolling of a bell, shall say the litany. And by can. 67. when any is passing out of this life, a bell shall be tolled, and the minister shall not then slack to do his last duty. And after the party's death (if it so fall out) there shall be rung no more than one short peal, and one other before the burial, and one other after the burial.

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The inhabitants of a chapelry, as well as the parishioners, are liable to repair the church, unless exempt by special custom.

(K) RELATIVE TO THE REPAIRS.

(a) *Who is bound to repair.*†

1. **BALL v. CROSS.** M. T. 1692. K. B. 1 Salk. 164. S. C. Holt, 138. S. P. **BROWN v. PALPY.** 2 Lev. 102. **WISE v. CREEK.** id. 186.

And it is there said, that the suit for such an aggression shall not be in the spiritual court; but a later judgment (E. 18. c. 12.) says, that though the churchwardens had an action at common law against those that had taken away the bells, yet the more proper remedy was in the spiritual court, because, at the common law only damages would be recovered, but the spiritual court would decree the restoring of the thing itself; 1 Roll. Rep. 57; 1 Sid. 281; Gibs. 206.

By the civil law, the goods belonging to a church are forbidden to be alienated or pawned, unless for the redemption of captives, for the relief of the poor in time of great famine and want, or for paying the debts of the church; if a supply cannot otherwise be raised, or upon other cases of necessity or great disadvantage to the church. And in every alienation the cause must be first examined, and the decree of the prelate intervene, with the consent of the whole clergy or chapter; Wood. Civ. L. 142; but by the laws of England, the goods belonging to a church may be alienated, yet the church wardens cannot dispose of them without the consent of the parish; and a gift of such goods by them, without the consent of the sidemen or vestry, is void; Wats. c. 89.

* The soil and freehold of the church and churchyard belong, we have seen, *ante*, 417, n., to the parson; see 2 Cro. 367; he alone therefore may grant a licence for burying in the church; see 2 Cro. 337; Noy. 104; and make a lease of the church; see 2 Roll. 337. So he is entitled to the trees growing in the churchyard for the repair of the church. But the possession of the church is in the minister and churchwardens, and no one can enter it, when not open for divine service, except with their permission: hence it was bolden, where the lessee of the great tithes had broken open the church, and erected pews, that the offence was cognizable in the ecclesiastical courts; see 3 Phill. Rep. 167.

† Anciently the bishop had the whole tithes of the diocese, a fourth part of which in every parish was to be applied to the repairs of the church; but upon a release of this interest to the rectors, they were subsequently acquitted of the repairs of churches; see Degge, part 1. b. 12. And still, by the canon law, the repair of the church devolves on him who receives such fourth part, see 1 Salk. 164.

The inhabitants of a chapelry within a parish were prosecuted in the Ecclesiastical Court, for not paying towards the repairs of the parish church; and the case was, those of the chapelry had never contributed, but always buried in the mother church, till about Henry VIII's time, the bishop was prevailed on to consecrate them a burial place, in consequence of which they agreed to pay towards the mother-church. And Holt, C. J. held, that by common law the parishioners of every parish are bound to repair the church, but by the canon law the parson is obliged to do it. In London, the parishioners repair both church and chancel, though the freehold is in the parson, and it is part of his glebe, for which he may bring an ejectment. In the principal case, those of a chapelry may prescribe to be exempt from repairing the mother-church, as where it buries and christens within itself, and has never contributed to the mother-church: for in that case it shall be intended coeval, and not a latter erection in case of those of the chapelry; but here it appears, that the chapel could be only an erection in ease and favour of them of the chapelry; for they of the chapelry buried at the mother-church till Henry VIII's time, and then undertook to contribute to the repairs of the mother-church. See 2 Roll. Abr. 290. l. 22; Hob. 67.

2. *WOODWARD v. MAKEPEACE.* M. T. 1692. K. B. 1 Salk. 184.

Woodward, who lived in the diocese of Litchfield and Coventry, but occupied lands in the parish of D., in the diocese of Peterborough, was there taxed, in respect of his land, as an inhabitant, towards a rate for new-casting the bells of the church, and, because he refused to pay, was cited into the court of the bishop of Peterborough, and libelled for the non-payment of the rate. *Per Cur.* First, This is not a citing out of the diocese within stat. 32 H. 8. c. 9; for he is an inhabitant where he occupies the land, as well as where he personally resides; *vide* Cro. Jac. 321; Cro. Car. 97. Secondly, Though he does not personally live in the parish, yet by having lands in his hands, he is taxable; and whereas it was pretended the bells were but ornaments, it was held they were more than mere ornaments; that they were as necessary as the steeple, which is of no use without the bells. And Holt, C. J. said, if he be an inhabitant as to the church, which is confessed, how can he not be an inhabitant as to the ornaments of the church? And the same rate applies to the occupiers of lands in the parish, tho' he be not resident there.

3. *ANON.* T. T. 1691. K. B. 4 Mod. 148.

On a libel in the Spiritual Court, against the defendant for non-payment of a rate towards the repairing of a church, &c., he suggested, that the lands were in the occupation of his tenant, and that he was therefore not an inhabitant of the parish; and this was held a good suggestion, for it is contrary to law to charge a person with repairs who does not live in the parish: the tenant of the land should be charged, and not the owner. And, *Per Cur.* If a man takes a lease of a stall in a market town, which he uses once a week to sell his wares, but lives in another parish, he shall not be charged towards the repairs of the church in that market town. But no person shall be charged to repair a church in respect of land which he has in another parish.

4. *REBOW v. DICKERTON.* M. T. 1721. Ex. Bunb. 81.

This was a prohibition to the Spiritual Court of the bishop of London, where a libel was exhibited against Sir Isaac, to oblige him to contribute towards the repairs of the church, in respect of a light-house, erected for the benefit of navigation at Harwich, which received a toll and duty from ships passing, &c. Upon a demurrer to the declaration, the Court were divided in opinion, whether the thing, in its own nature, was rateable towards the repairs of the church; and in both points Lord Chief Baron Bury, Mountague and Page, were of opinion for the plaintiff in prohibition; Baron Price contrary on both points, and cited in support of his opinion, Lib. 2. Bishop of Winton; Cro. Eliz. 571; 2 Ro. Abr. 319; Creswell, 2 Lutw. 1022; Dawson and Nicholson, in Scace, Mich. 1710; 2 Ro. Rep. 42; Dr. Prideaux's Office of churchwardens, Yelv. 173; and see 3 Burr. 1689; 3 T. R. 107. Nor in respect of a lighthouse.

5. *JUCE v. ROUSE.* M. T. 1695. K. B. 12 Mod. Rep. 83.

Rouse, churchwardens, and others, libelled in the Spiritual Court for their repair the And the parson is bound to

chancel* of the church, unless there be a custom to the contrary. [421] The opinion of the Common Pleas was said to be, that the Spiritual Court may grant a sequestration upon an impropriate personage for not repairing the church.†

It is said that the Spiritual Court may grant a sequestration upon an impropriate personage for not repairing the church.†

Thought this doctrine seems to have been doubted.

The Spiritual Court may, by excommunication, compel the parishioners

proportion of a church-rate for repairing the chancel and church, whereas the parson, *de communi jure*, ought to repair the chancel; and no objection being made, prohibition ought to go to the whole. *Per Cur.* Let it be so; of common right, that is, by the ancient canon and civil law, the parson ought to have repaired the whole church; and it is by the custom of England only that the parish repairs the body.

6. ANON. M. T. 1676. K. B. 3 Keb. 829.

The opinion of the Common Pleas was said to be, that the Spiritual Court may grant sequestration on an impropriate parsonage, for not repairing the chancel of the church.

7. ANON. T. T. 1669. C. P. 2 Vent. 35; S. C. 1 Mod. 258; 2 Mod. 254; 1 Freem. 230.

In action of trespass the defendant pleaded, that the plaintiff was impropriator of a certain rectory, and that he was sued in the Ecclesiastical Court, and by sentence there the profits were sequestered for the repairs of the chancel. To which the plaintiff demurred, supposing, that by the 31 H. 8. the profits of rectories impropriate were made lay-fee, and so not subject to be sequestered by the Court Christian; and therefore it was supposed, that the lay impropriator could not sue for tithes in the Spiritual Court; for which cause 32 H. 8. was made, to empower laymen to recover them. And 35 H. 8. gives the ordinary remedy for procurations and synobals, which it was conceived has been lost by making the rectories lay-fee; 2 Cro. 518. In Parry and Bank's case it is resolved, that when the rectory is in the hands of a lay impropriator, the ordinary cannot dissolve the vicarage, nor, in such case, can he augment the vicarage; Roll. 339. The form of pleading being objected to, on grounds which the Court held fatal, and therefore gave no opinion as to the matter in law, but did incline that there could be no sequestration; for being made lay-fee, the impropriation was out of their jurisdiction, and it was now only against the parson, as against a layman, for not repairing the church. And, they said, in case of dilapidations, the whole ought not to be sequestered, but to leave a proportion to the parson for his livelihood.

(b) Who can enforce the repairs.†

ROGERS v. DAVENANT. H. T. 1674. K. B. 1 Mod. Rep. 194.

Per North, C. J. The Spiritual Court may compel parishioners to repair their parish church if it be out of repair, and may excommunicate every one of them till it be repaired; and those that are willing to contribute must be

* Repairing of the chancel is a discharge from contributing the repairs of the church; see 2 Roll. Rep. 211; 2 Keb. 780; Gibs. 199. But the repairing of a chapel of ease affords no exemption from the repairs of the church; see 2 Roll. Abr. 289.

† Because impropriate rectors are bound of common right to repair the chancel; this doctrine is clear and uncontested; the only difficulty has been in what manner they shall be compelled to do it; whether by spiritual censures only, in like manner as the parishioners are compelled to contribute to the repairs of the church, since impropriations are now become lay fees; or whether by sequestrations (as incumbents, and as should seem, spiritual impropriators of all kinds, may be compelled); Gibs. 199.

‡ The archdeacons and their officials are enjoined, that in the visitation of churches they have a diligent regard to the fabric of the church, and especially of the chancel, to see if they want repair; and if they find any defects of that kind, they shall limit a certain time, under a penalty, within which they shall be repaired. Also they shall inquire by themselves, or their officials, in the parishes where they visit, if there be ought in things or persons which want to be corrected; and if they shall find any such, they shall correct the same, either then or in the next chapter; see Lind. 53. Where the penalty is not limited, the same is arbitrary, but this cannot intend the penalty of excommunication. Inasmuch as it concerns the parishioners *ut universos*, as a body or whole society, who are bound to the fabric of the body of the church; for the pain of excommunication is not inflicted upon a whole body together, although it may be inflicted upon every person severally, who shall be culpable. And the same may be observed as to the penalty of suspension, which cannot fall upon the parishioners as a community or collective body. Yet the archdeacon in this case, if the effect be enormous, may enjoin a penalty, that after the limited time shall be expired, divine service shall not be performed in the church, until competent reparation shall be made; so that the parishioners may be punished by suspension or interdict of the place. But if there are any particular persons who are bound to contribute towards the repair, and although they be able, are not willing, or do neglect the same, such may be

absolved till the greater part of them agree to assess a tax, but the court cannot assess them towards it. It is like to a bridge, or highway; a *distringas* shall issue against the inhabitants to make them repair it; but neither the King's court, nor the justices of peace, can impose a tax for it. *Wyndham, Atkins, and Ellis, Js.* accorded the churchwardens cannot now, but a parliament can, impose a tax; but the greater part of the parish can make a bye-law; and to this purpose they are a corporation. But if a tax be illegally imposed, as by a commission from the bishop to the parson, and some of the parishioners, to assess a tax, yet if it be assented to, and confirmed by the major part of the commissioners, they, in the Spiritual Court, may proceed to excommunicate those that refuse to pay it. [422]

(c) *Of repairing united churches.*

If two churches be united, the repairs of the several edifices shall be made as they were before the union; see Degge, p. 1. c. 12.

(L) RELATIVE TO THE CHURCH-RATE.

(a) *By whom and where to be made.*

PIERCE V. PROUSE. T. T. 1695. K. B. 1 Salk. 165. S. C.

The churchwardens assessed a rate for repairs of the church, and afterwards brought a libel against a parishioner for not paying it. The court being moved for a prohibition, *Per Cur.* The parishioners ought to assess the rate, and not the churchwardens. [423]

The rate for repairing a church is to be made by the parishioners.*

(b) *Of the persons and things chargeable.*

1st. *In respect of land.*

Church-rates are not chargeable on the land, but on the person in respect of the land; see Degge, p. 1. c. 12. Houses as well as lands are chargeable, and, in some places, houses only; as in cities and large towns, where there are only houses and no lands; see Hetl. 130; 2 Lutw. 1019.

2d. *As to double rates.*

It has been said, that if a person be rated for the ornaments of the church according to his land which he has in the parish, a prohibition lies, because the rate ought to be according to his personal estate; see 2 Roll. Abr. 291. And if a person, who is not an inhabitant within the parish, but who has land there, be rated for the ornaments of the church according to his land, a prohibition lies, for the inhabitants ought to be rated for them; *ibid.* And the Court of K. B. have defined and agreed, that a rate for the reparation of the fabric of the church is real, charging the land, and not the person; but a rate for ornaments is personal upon the goods, and not upon the land; see Gibs. 196; Degge, p. 1. c. 12.

3d. *As to lands lying in another parish.*

WOODWARD V. MAKEPEACE. M. T. 1688. K. B. 1 Salk. 164.

It was agreed, that though the owner does not personally live in the parish, yet by having lands in his hands, he is taxable, as an inhabitant, to the church, compelled by a motion to such contribution, under pain of excommunication; that so the church may not continue for a long time unrepaired, through their default; *Lindw.* 53. But, according to the modern practice, churchwardens have the special charge of the repairs of the church. And it seems now, that the process shall issue against the churchwardens, and they may be excommunicated for disobedience. As to their duty, see *post*, tit. Churchwardens.

Lands in a parish where the owner does not reside are rateable.*

* And the churchwardens assembled in vestry together upon public notice given the church; see 2 Phill. Rep. 373. And the major part of them that appear shall bind the parish; or if none appear, the churchwardens alone may make the rate; because they, and not the parishioners, are to be cited and punished for defect of repairs. see 5 Madd. 4. But the bishop cannot direct a commission to rate the parishioners, and appoint what each one shall pay; this must be done by the churchwardens and parishioners, and the Spiritual Court may inflict spiritual censures till they fulfil their duty; see Gibs. 196; 1 Bac. Abr. 373. But if the rule be illegally imposed by such commission from the bishop or otherwise, without the parishioners' consent, yet if it be after assented to and confirmed by the major part of the parishioners, that will make it good; see Wats. c. 39.

† Because he is charged in respect of the land, it not being a personal rate; see 2 Roll. Abr. 289. But it has been before stated, that a person cannot be charged in the parish where he is inhabitant for land which he has in another parish, to the reparation of that church where he inhabits, for then he might be twice charged, for he may be charged for

4th. *As to tenant and landlord.*

ANON. T. T. 1692. K. B. 4 Mod. 148.

The tenant and not the landlord is rateable.† [424]

On a libel in the Spiritual Court against the defendant for not paying of a rate towards the repairing of a church, &c. he suggested, that the lands were in the occupation of his tenant, and that he was not an inhabitant of the parish where this church was, &c.; and this was held a good suggestion; for it is contrary to law to charge a person with repairs who does not live in the parish. The tenant of the land should be charged, and not the owner.

Per Cur. If a man takes a lease of a stall in a market town, which he uses once a week to sell his wares, but lives in another parish, he shall not be charged towards the repairs of the church in that market town.

5th. *As to the founder.*

It seems that the founder of a church, and his tenants, are exempt from the charge of repairing it; see Degge, p. 1. c. 12.

6th. *As to the rectory.*

The rectory or vicarage are not chargeable to the repair of the body of the church; see Degge, part 1. c. 12. But an impropiator of a rectory is bound to contribute to the repair of the church, if he has lands in the parish which are not parcel of the rectory; see Gibs. 197.

7th. *As to the inhabitants of several vills in one parish.*

BURTON v. WILDREY. M. T. 1737. K. B. And. 32.

If a parish consists of several vills, and there is a custom to levy the rate in certain proportions they must pursue it whether reasonable or not.

In prohibition the plaintiff states, that M. is an ancient parish, having an old parish church, and consisting of one village called A., and three other villages, and sets forth a custom to make a general rate to reimburse the churchwardens their expenses, and for the inhabitants of A., by a particular levy, to raise two-thirds of such rates, and the inhabitants of three other villages, by a particular levy, the other one-third. That a rate was made by the parishioners for reimbursing the sum of 19l., laid out by defendants (the churchwardens) in repairing the church, and the said three villages were rated at above one-third.—Held, that the custom is well alleged, and a reasonable one, for the word “inhabitant” is to be construed according to the subject matter, and includes all such persons, and those only, as by law are liable to the payment of church-rates. The custom may be, or might have been, a reasonable one, and though the reason assigned by the plaintiff, viz. that A. has more inhabitants, be not sufficient, it shall not therefore be overturned.

8th. *As to the hall of a company.*

The hall of a company is rateable to the repairs of a church; see Jones, 187.

9th. *As to a stall in a market.*

A petty chapman who takes a standing, for rent, in the waste of the manor within the market, for two or three hours every market-day, to sell his commodities, and inhabits in another parish, he is not rateable to the reparation of the church in respect of the standing; see 2 Roll. Abr. 289.

(c) *Of the mode of assessing the rate.*

[425] The assessors, in their arrangement of the rate, must observe the following rules:—1st. Every inhabitant dwelling within the parish is to be charged according to his ability, whether in land or living, within the said parish, or for his goods there; that is to say, for the best of them, but not both. 2d. Every farmer dwelling out of the parish, and having lands and living within the said parish in his own occupation, is to be charged to the value of the same lands or living, or else to the value of the stock thereupon, even for the best, but not for both. 3d. Every farmer dwelling out of the parish, and having lands, and living within the parish, in the occupation of any farmer or farmers, is not to be charged; but the farmer or farmers are to be charged in particularity every one according to the value of the land which he occupies, or according to this in the parish where the land lies; see 2 Roll. Abr. 289; hence the rate shall be laid upon the lands in the parish, although the occupiers inhabit in another parish; see 5 Co. 66.

† For it was determined in Jeffrey's case, 5 Co. 66. that it is the inhabitant and parishioner who is to be chargeable, and that the receipt of rent cannot make the lessor a person of that description.

to the stock thereupon; even for the best, but not for both. 4th. Every inhabitant and farmer occupying arable land within the parish, and feeding his cattle out of the parish, is to be charged for the arable lands within the parish, although his cattle be fed out of the parish. 5th. Every farmer of any mill within the parish is to be charged for that mill; and the owner thereof (if he be an inhabitant) is to be charged for his liability in the same parish, besides the mill. 6th. Every owner of lands, tenements, copyholds, or other hereditaments, inhabiting within the parish, is to be taxed according to his wealth in regard of a parishioner, although he occupy none of them himself; and his farmer or farmers also are to be taxed for occupying only. And, 7th. The assessors are not to tax themselves, but to leave the taxation of them to the residu of the parish; Form of Assessment; 1 Burn. Ecc. 384; see God. Append. 10, 11.

(d) *Of the appeal against the rate.*

If any person shall find himself aggrieved at the inequality of any such assessment, his appeal is to the Ecclesiastical Court; see Degge, part 1. c. 12.

(e) *Of the mode of enforcing compliance with the rate.**

1. ROGERS v. DAVENANT. H. T. 1674. S. P. 2 Mod. Rep. 8; S. C. 1 id. 194.
236. S. P. REX v. PEPPER. M. T. 1694. K. B. Comb. 298.

It was agreed that the Spiritual Court has power to compel the parish to repair the church by their ecclesiastical censures, but they cannot appoint what sums are to be paid for that purpose, because the churchwardens, by the consent of the parish, are to settle that. As if a bridge be out of repair, the justices of peace cannot set rates upon the persons that are to repair, but they must consent to it themselves. The Spiritual Court has power to compel the parish to repair, but not to make the rate. [426]

* If any of the parishioners refuse to pay their rates, being demanded by the churchwardens, they are to be sued for and to be recovered in the ecclesiastical courts, and not elsewhere; Degge, p. 1. c. 12. For the cognizance of rates made for the reparation of churches and churchyards belongs to the Spiritual Court. And lately the Court of K. B. refused to grant a *mandamus* to churchwardens to make a church rate, the matter being one of exclusive ecclesiastical jurisdiction, 5 T. R. 364. Pursuant to this general doctrine, prohibitions have on many occasions been denied, or consultations granted by the temporal courts. As in this case of Crumpton and Paget, Cro. Eliz. 659; where it was moved, that they of the Spiritual Court would try the quantity of the land (the tax being according to the rate of their land, and the person pretending that he was taxed for more land than he really had); and it was alledged, that this was always triable at common law; the resolution of the Court was, that the principal being suable in the Spiritual Court, the circumstances concerning it are inquirable and triable there also, and a consultation awarded. So also where it suggested in order to a prohibition that the lands were overrated, and that the custom of the parish was, not to be rated according to the lands and houses, but according to sheep walks; the Court declared, as to the first suggestion, that it was not material, because rates being to be proportioned to the value of the land, the valuing of the land must properly belong to the Spiritual Court; and as to the second, it was said by Haughton (but not finally resolved by the Court,) that of common right the house and all the lands are chargeable to the reparation of the church; and that customs, in prejudice of such reparation, are void; as, at another time, the discharge by custom of 900 acres of wood, from payment of church rates, was declared to be a custom against law. Again, in the case of Longmore and Churchyard, (Litch. 217.) where the suggestion was, that by custom the rate ought to be in proportion to the king's tax, and that the party was rated above that proportion; Bulstrode said, this was a spiritual matter, and ought to be tried in the Spiritual Court, unless it appeared that some proof, which ought to be allowed by the rules of the common law, had been offered there and disallowed; and in the event, consultation was awarded by the whole court. So (Poph. 197.) where it was alledged that the rate was imposed needlessly (viz. for casting new bells, where there were four before), a prohibition was denied. In like manner (1 Vent. 308) where a prohibition was prayed, upon a surmise that the tax was imposed upon one part of the parish, omitting the rest; the Court doubted in regard it was not alledged that they had offered that plea in the Ecclesiastical Court, because reparation of churches is proper for their cognizance. And though a prohibition was granted, that the others might demur if they thought fit. yet it was afterwards countermanded; for this may be properly pleaded in a Spiritual Court, and if not allowed, is a cause of appeal; Gibbs, 195. So if a suit is instituted in the Ecclesiastical Court for a church rate, and a custom pleaded of a certain sum, or of something done, in lieu of the rate, and that a plea is admitted. they proceed to try that custom in the same manner as a *modus*; but if the custom is denied, it will be a proper ground for a prohibition (by the Lord Chancellor Hardwicke,) for the defect of trial in the Ecclesiastical Court.

But, when the rate is made, the Spiritual Court may compel the payment of it.

2. **THE CHURCHWARDENS OF ST. ANN, WESTMINSTER.** M. T. 1696. K. B. 1. Ld. Raym. 512. S. P. MAYSE v. GERMAN. M. T. 1680. C. P. 2. Show. 141.

Upon a motion for a prohibition to stay a suit against J. S. for not paying a tax imposed by the Churchwardens and other parishioners for building the Church of St. Ann's in Westminster. The Court said, a suit may lie in the Spiritual Court for non-payment of a tax assessed for repairs of a church, but not for building a Church.

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The 53 G. 3. S. 248.

§. 127. s. 7.* which gives the justices sum-
marily jurisdiction to compel payment of church rates, is restricted where the party charged gives notice to the justices of his intention to dispute its validity, although no proceeding is commenced in the Ecclesiastical Court.

3. **REX v. THE CHURCHWARDENS OF MILNBOW.** T. T. 1816. K. B. 5 M. & S. 248.

The Court were, in this case, called upon to decide whether, under the 53 Geo. 3. c. 127. s. 7. a party summoned before two justices for non-payment of a Church rate, might give them notice that he disputed the validity of the rate, or his liability to pay the same, although no proceeding was commenced in the Ecclesiastical Court, and thereby deprive them of the power to proceed. *Per Cur.* Before the passing of the statute in question, a considerable expence and delay was incurred in the recovery of Church rates. The object of the legislature, as it appears to us, was to give a remedy by summary application in the case of a Church rate withheld, but not to draw questionable cases *ad aliud examen*. A jurisdiction was accordingly created with certain exceptions; as, 1st. that the amount shall not be beyond 10*l.*; in the next place, it must be in respect of a matter where the validity of the rate has not been questioned in the Ecclesiastical Court. But in this case the jurisdiction of the justice is well initiated. Then comes the proviso which limits the exercise of their jurisdiction. It declares, that if the validity of the person who is demanded to pay the same, be disputed, and the party disputing the same give notice thereof to the justices, the justices shall forbear giving judgment thereupon; so that the condition respecting the proceeding in any Ecclesiastical Court, applies to the issuing of the summons, and is not inconsistent with the party's disputing the validity of the rate when he comes before the justices, although a proceeding may not then have been instituted in the Ecclesiastical Court. The enacting clause refers to the commencement of the justice's jurisdiction, the proviso to the proceeding upon it after it has well attached. The notice given by the person whose case is now before us is a *cesser* of the proceeding before the magistrates. He may, therefore, proceed to recover his demand according to the due course of law, as before accustomed. See 1 Burr. 485.

for the trying of the custom of the common law; 1 Atkyns, 289. So if the bounds of the parish come in dispute in the Ecclesiastical Court, that is, if the party assented aver that the land for which he is assessed lies in another parish, and not in the parish where it is assessed, if the party be contentious, he may have a prohibition, and try it at common law; Dogge, p. 1. c. 12.

* By statutes 53 Geo. 3. c. 127. s. 7. for England; and 54 Geo. 3. c. 68. s. 7. for Ireland, when any person rated to church or chapel rate (the validity of which has not been questioned in any ecclesiastical court.) shall refuse to pay the same, any justice of the county, city, or town, where the church is situate, on complaint of the churchwardens, who ought to receive the same, may convene, by warrant, such person before two or more justices, and examine, on oath administered to by them, into the merits of the complaint, and, by order under their hands and seals, may order payment of any sum so due, not exceeding, 10*l.*, besides costs, ascertained by the justices; and on refusal or neglect to pay according to such order, any one of such justices, by warrant under hand and seal, may levy the money thereby ordered to be paid, with the above costs, as well as those of distress being first allowed as above, by distress and sale of the goods of the offenders, his executors, or administrators, rendering him the overplus. Any person grieved by the judgment of two or more such justices, may appeal to the next quarter sessions for the county, &c. wherein the church, &c. for which the rate was made is situate; and if the justices present, or a majority, find cause to affirm the judgment, it shall be decreed by order of sessions, with costs, to be levied by distress and sale of appellant's goods. Provided that when such appeal is made as above, no distress warrant shall be granted till after its determination; and that nothing herein shall alter the jurisdiction of ecclesiastical courts, to hear and determine causes touching the validity of any church or chapel rate; or from enforcing payment thereof, if exceeding 10*l.* from the party proceeded against; if the validity of such rate or liability of the person from whom it is demanded be disputed, and the party

(f) *Of the levy for the non-payment of the rate.*

REX v. THE CHURCHWARDENS OF MILNEROW. T. T. 1816. K. B. 5 M. & S. 248.

The 53 Geo. 3. c. 127. s. 7., by which a remedy is given by summary application to justices in the case of a Church rate withheld, provides, that if there should be a purpose notified by the party who is brought before the justices, that he means to dispute the validity of the rate, or his liability to pay, the justices shall forbear. The question which now arose was, whether what passed before the magistrates in the case before the Court, was a sufficient notice of the party's intention to dispute the rate. It appeared, that at the hearing before the justices, and in their presence, the party alleged to be liable declared that he would bring an action against any person who ventured to levy the rate, as he thought he had no right to pay, because he had no claim or seat in the Chapel. The Court held it sufficient, and said: if a person was merely to say before the justices that he disputed the rate, it would not be sufficient, inasmuch as he ought to show something to manifest that he disputed it *bona fide*. But here the party says, in effect, "I dispute the validity of the rate;" and not only so, but he gives his reason for it, viz. "because he had no claim or seat in the Chapel." Whether this be or be not a valid ground for disputing his liability to pay the rate, it is not for us to decide; nor was it for the justices, against the will of the party. It seems to us, therefore, that this was such a notice to the justices of the party's disputing the rate, as calling on them to forbear proceeding to judgement

And a declaration by a party summoned before two justices under the 53 Geo. 3. for nonpayment of a church rate that he would bring an action against any person who ventured to levy the rate, as he thought he had no right to pay, because he had no claim to or seat in the chapel, is a sufficient notice that he disputes his liability to pay the rate, as a matter of course of the proceedings.

(M) RELATIVE TO PROFANENESS IN THE CHURCH.

(a) *By making an arrest*

Arrests in churches and church-yards are expressly interdicted by the 50 Edw. 3. c. 5. and 1 Rich. 2. c. 15. and though the arrest under such circumstances give notice thereof to the justices, they shall forbear giving judgment thereon, and the persons demanding the same may proceed to recovery of their demand by due course of law, as before accustomed; but nothing herein shall affect parliamentary regulations respecting church or chapel rates of any particular parishes or districts. And by 54, G. 3. c. 170. s. 12. the goods and chattels of any person neglecting to pay any sum legally assessed on him for any church-cess, for seven days after demand made, may be distrained, not only within the district, parish, township, or hamlet, in which it is made, but also within any other district, parish, &c. within the same county, riding, division, or jurisdiction; and if sufficient distress cannot be found within such county, &c., then, on oath thereof made before any one or more justice or justices of the peace of any county, &c. in which any of the goods or chattels of such person shall be found, which oath such justice or justices shall administer and certify, by indorsing his or their name or names on the warrant granted to make such distress, such goods, &c. shall be liable to such distress and sale in such other county, &c. and may, under such warrant and certificate, be distrained and sold, as if found within the district, parish, &c. in or for which the rate was due. Where a constable having a warrant of distress under 53 Geo. 3. c. 127. s. 7. broke the outer door of, and entered plaintiff's dwelling-house, it was held, that although he thereby exceeded his authority, yet, as it was not shown that he acted with any other intention than that of executing the authority delegated to him by the warrant, no action could be maintained after the expiration of three calendar months after the fact committed; see sect. 12. of this act; *Theobald v. Crickmore*, 1 Bar. and Ald. Rep. 227. abridged *post*, Constable. And by 17 Geo. 2. c. 37. where there shall be any dispute in what parish or place improved wastes, and drained and improved marsh lands lie, and ought to be rated; the occupiers of such lands, or houses built thereon, tithes arising therefrom, mines therein, and saleable underwoods, shall be rated to this and all the other rates, within such parish and place as lies nearest to such lands; and if on application to the officers of such parish or place to have been rated as aforesaid, any dispute shall arise, the justices of the peace at the next sessions after such application made, and after notice given to the officers of the several parishes and places adjoining to such lands, and to all others interested therein, may hear and determine the same on the appeal of any person interested, and may cause the same to be equally assessed; whose determination therein shall be final. But this shall not determine the boundaries of any parish or place, other than for the purpose of rating such lands to the parochial rates as aforesaid. And the church-rate charged upon quakers is recoverable before the justices of the peace, in like manner as their tithes. If the churchwardens defer to make or collect their rate until they are out of their office, they are deprived of all legal authority of doing either; but they may present the persons in arrear, at the Easter visitation, when they go out of their office; and the judge will cause justice to be done therein, or their successors may prosecute for the same; 1 Bac. Abr. 376.

stances would not be void, the party may be indicted; see Cro. Eliz. 654; Cro. Car. 602; 29 Car. 2 c. 7; Petersdorff on Bail, 128.

(b) *By holding fairs and markets.*

By the 13 Edw. 1. st. Wynton, c. s. it is commanded from henceforth neither fairs nor markets be kept in churchyards nor churches; see Athen 137.

(c) *By holding temporal courts.*

No temporal courts, leets, nor lay juries, are to be holden in church, chapel, nor churchyard; see Lind. 270.

(d) *By holding plays.*

By the 88th canon, no plays are to be kept in the church, chapel, or churchyard; see Gibs. 191.

(e) *By having feasts.*

By the 88th canon, the churchwardens or questmen shall suffer no feasts, banquets, suppers, church ales, drinkings, or any other profane usage, to be kept in the church, chapel, or churchyard.

(f) *By having musters.*

By the 88th canon, the churchwardens or questmen, and their assistants, shall suffer no muster to be kept in the church, chapel or churchyard.

(g) *By Brawling.* See tit. Brawling.

(h) *By disturbing the congregation during divine service.*

1. GLEVER v. HYNDE. M. T. 1672. C. P. 1 Mod. 168.

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Any person though not a constable or church warden, may prevent a person disturbing a congregation while the minister is performing the burial service.

In an action of assault and battery against the defendants, the declaration stated, that the defendants, at York Castle, in the county of T., with force and arms, did assault, and ill treat the plaintiff, to his damage, &c. To which the defendants pleaded not guilty to the assault, beating, and ill entreating; and say, that at such a place in the county of Lancaster, one J., a curate, was performing the rites and funeral obsequies, according to the usage of the church of England, over the body of —, there lying dead, and ready to be buried; and that the plaintiff did maliciously disturb him, and they, the defendants, required him to desist, and because he would not, that they, to remove him, &c. for the preventing of further disturbance, *molliter manus*. On demurrer, it was contended, that the plaintiff, according to the 1 P. & M. c. 3. had only exposed himself to ecclesiastical censurers.

Per Cur. The 1 P. & M. only extends to preachers; but the 1 Eliz. c. 3. s. 9. includes all men in orders that perform any of the public service. But neither of these statutes take away the common law. Therefore any person there present might have removed the plaintiff at common law; for they were all concerned in the service of God that was then performing, so that the plaintiff, in disturbing it, was a nuisance to them all; and might be removed by the same rule of law that allows a man to abate a nuisance.—Judgment for defendant. See 1 Stra. 688; 1 Hawk. P. C. 271; 12 Mod. 610; 1 Ld. Raym. 62; 1 Saund. 13.

2. COCKRUFT. v. COCKRUFT. E. T. 1685. K. B. Comb. 17.

But a battery it is said cannot be justified by removing a party from church, unless the party be a churchwarden.

In an action for a battery by removing plaintiff from his seat in church, the defendant pleaded *molliter manus imposuit*; it was contended, however, for the plaintiff, that the plea was insufficient. And, after long consideration, the court were of opinion, that there could be no justification of a battery in a church, unless in the case of churchwardens.

3. HAWE v. PLANNA. M. T. 1666. K. B. 1 Saund. 13.

Trespass for assault; plea, that defendant, as churchwarden, committed the assault by taking off the hat of the plaintiff, who persisted in wearing it (after request made) during divine service.—Judgment for defendant.

4. REX. v. BLISSET AND ANOTHER. M. T. 1699. K. B. 1 Mod. Rep. 13; S. C. 2 Keb. 558.

And the latter may justify taking off a person's hat during divine service.

Meeting tumultuously at a place of worship,

It was agreed, that to meet in conventicles in such numbers as may be affrighting to the people, and in such numbers as the constable cannot suppress, is a breach of the peace, and the party shall be bound in a recognizance for his good behaviour.

(N) RELATIVE TO THE CHURCHWAY.*

REX v. THROWER. E. T. 1625. K. B. 1 Vent. 208.

Thrower was indicted for stopping *communem viam pedestrem ad ecclesiam de Whitby*; and the indictment being removed by *certiorari*, it was objected that an indictment would not lie for a nuisance in a church path, since the proceedings ought to be in the Ecclesiastical Court; and 2d, the damage is private, and only concerns the parishioners. Where there is a footway to a common, every commoner may bring his action if it be stopped; but in such case there can be no indictment. Hale, C. J. If this were alleged to be *communis via pedestris ad ecclesiam pro parochianis*, the indictment would not be good, for then the nuisance would extend no further than the parishioners, for which they have their particular suits; but, for aught appears, this is a common footway, and the church is the only *terminus ad quem*, and it may lead further; the church being expressed only to ascertain it, and 'tis said *ad commune nocumentum*: wherefore the rule was, that he should plead to it.

is a breach of the peace, [431] An indictment for stopping *communem viam pedestrem ad ecclesiam de Whitby*, is good.†

(O) RELATIVE TO NONCONFORMITY TO THE WORSHIP OF THE CHURCH.

BRITTON v. STANDISH. H. T. 1700. K. B. 1 Salk. 166; S. C. 3 Salk. 88; S. C. 6 Mod. 188; S. C. Holt. 141.

The plaintiff was libelled in the spiritual court by Mr. Standish, the parson of the parish, for not coming to his parish church on Sundays; to which he pleaded, that he went to another church more commodious for him: on this matter being suggested, there was a prohibition, and the plaintiff declared therein; and the single question was, whether he was compellable to go to his parish church? It was said he was compellable, because every person was obliged to allow a parishioner of another parish to partake of sacraments with

[432] The Ecclesiastical Court may punish persons who do not go to church on Sunday, but it seems a parishioner is not bound to go to his own parish church.

* The right to a churchway may be claimed and maintained by libel in the Spiritual Court; see Ayl. Par. 438; Gibs. 298. Such easement is commonly claimed as a private way; and on suggestion that it is a highway, a prohibition will be granted; see Gibs. 298; 2 Roll. Abr. 287; Ayl. Par. 438.

A way to a parish church, or to the common fields of a town, or to a village which terminates there, may be called a private way, because it belongs not to all the king's subjects, but to the particular inhabitants of such parish, house, or village, each of which, as it seems, may have an action for a nuisance therein; whereas nuisances in highways are punishable by indictment, and are not actionable, unless they cause a special damage to some particular person; 2 Bac. Abr. tit. Highways, A. If a way leading to a church be a private way, he who ought to repair may be compelled to repair by the Ecclesiastical Court, and no prohibition will lie; but otherwise if it be a highway, though it lead to a church; March. 45. If it be a highway, that is, common to all his majesty's subjects, the charge of repairing it, of common right, lies on the occupiers of lands within the parish, but may be cast on certain persons by reason of inclosure, tenure, or prescription; and in some cases is to be regulated by the surveyors appointed under the highway acts; see 3 Bac. Abr. 493. 494.

† Persons of the established church, who absent themselves from divine worship through total irreligion, and attend the service of no other persuasion, by the 1 Eliz. c. 2; 28 Eliz. c. 1; and 3 Jac. 1. c. 4; forfeit 1s. to the poor every Lord's day they so absent themselves, and 20l. to the king if they continue such default for a month. And if they keep any inmate thus irreligiously disposed in their houses, they forfeit 10l. per month; and this is still an indictable offence, though prosecutions by indictment are unfrequent; see the statute cases, 1 East, P. C. 10; 28 Hawk. b. 1. c. 10; Bac. Ab. Heresy, D; Burn, J. and Dick. J. tit. Lord's Day; Williams, J. Sabbath. The statute 29 Eliz. c. 6. s. 6. provides, that the indictment need not mention that the offender had no reason or excuse for his absence, or that he was within England; but he must now show this in his plea. The statute 3 James 1, c. 4. s. 16. provides, that no proceedings on the above statutes shall be reversed for any defect of form, other than by direct traverse of the party's not having been at church, &c. The offence need not be alleged in the county where the party was at the time, it being a mere nonfeasance, and, properly speaking, not committed any where; 1 East, P. C. 18; Hawk. b. 1. c. 10. s. 12; 6 Bac. Abr. Heresy, D. 7.—Various pleas and excuses may be successfully offered to prosecutions under these statutes. By sect. 24. of the stat. 1 Eliz. c. 2. punishment by the ordinary is a bar to further proceedings; 1 East, P. C. 19. Stat. 23 Eliz. c. 1. s. 5. only affects persons above 16 years of age. An indictment for any first offence may be avoided by conformity, and all penalties prevented by showing a sufficient excuse for absence; and Catholic and Protestant dissenters may plead the Acts of Toleration, and of 31 Geo. 3. to almost all prosecutions under these acts.—Evidence; proof of absence from the party's own parish church is, it is said, sufficient to throw the onus upon him of proving where he went to church; 1 East, P. C. 19,

him; 2 Spel. Conc. 141; Lyn. 184. 233; Reform. L. Eccl. 106; Spar. Coll. 77. 78. 126. 237. 181. 31. and that this is allowed by common law; see 2 Rol. Rep. 438. 455. Hardr. 406. 407; and that the spiritual court is to judge of the excuse; March. 93. And by the act of uniformity, every man is required to resort to his parish church; On the other side it was argued, that the distribution into parishes was by the common law, and that if this distribution did by consequence bring people under a new obligation, such obligation might be examinable by the common law; that the statute of uniformity has been always looked on as sufficiently complied with by going to any church, and stat. 23 Eliz. imposes a penalty on any person that absents himself from the church, contrary to the stat. 1 Eliz. ; and that if these acts are construed to give a jurisdiction, that jurisdiction must be to the common law courts, and not the Ecclesiastical courts. And the court resolved, that every man was obliged to go to some court or other, and that an entire neglect was punishable in the Ecclesiastical Court; and that it was a good charge at first sight, that a man went not to his parish church, because he shall not be supposed to go to any other. And the Court seemed to be of opinion, that though the act of uniformity is taken to be introductive of a new law, yet the thing being purely of ecclesiastical consueance, and proper for their examination, a consultation ought to go.

(P) RELATIVE TO BURGLARY IN. See *ante*, vol. 4. p. 753. 762.

(Q) RELATIVE TO LARCENY IN. See *post*, tit. Larceny.

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II. AS TO CHAPELS.

(A) RELATIVE TO PRIVATE CHAPELS.

Private chapels are such as noblemen, and religious persons, have, erected at their own individual charge, for the accommodation of themselves and their families. These private chapels, and their ornaments, are to be maintained at the party's expence to whom they belong, and chaplains provided for them, and should be consecrated by the bishop of the diocese; see Degge. p. 1. c. 12. And by the 71st canon, no minister shall preach or administer the holy communion in any private house, unless it be in times of necessity, when any being either so impotent as they cannot go to the church, or very dangerously sick, are desirous to be partakers of the holy sacrament, upon pain of suspension for the first offence, and excommunication for the second. Provided, that houses are here reputed for private houses wherein are no chapels dedicated, and allowed by the ecclesiastical laws of the realm; and provided, also, under the pain before expressed, that no chaplain do preach, or administer the communion, in any places but in the chapels of the aforesaid houses; and that also they do the same very seldom upon Sundays and holidays, so that both the lords and masters of the said houses, and their families, shall, at other times, resort to their own parish churches, and there receive the holy communion at the least.

(B) RELATIVE TO FREE CHAPELS.

A free chapel is exempt from all ordinary jurisdiction; see Gibs. 210. The king may erect a free chapel, and exempt it from the jurisdiction of the ordinary, or may license a subject so to do; see Degge, p. 1. c. 12. And in Gobd. 145. it is said, the king may license a subject to found a chapel, and by his charter exempt it from the visitation of the ordinary; but in Gibs. 211. it is said, no instance has ever occurred.

(C) RELATIVE TO CHAPELS OF EASE.

A chapel of ease merely, is that which was not allowed a font at its institution, and which is used only for the ease of the parishioners in prayers and preaching, (sacraments and burials being received and performed at the mother church,) and commonly where the curate is removable at the pleasure of the parochial minister. A chapel of ease may, however, have the rights of a parochial chapel by custom; but, in the present day, when a chapel is instituted, though with the parochial rights of christening and burying, there is usually, if not always, a reservation of repairing to the mother church on a certain day or days, to preserve the subordination; Gibs. 299.

(D) RELATIVE TO THE REPAIR.

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The repairs of a chapel are to be made by rates on the landholders within the chapelry, in the same manner that the repairs of a church; and such rates are to be enforced by ecclesiastical authority; see *Gibs.* 209; 58 *Geo.* 3. c. 45. s. 18; 59 *Geo.* 3. c. 134. s. 12.

(E) RELATIVE TO THE CELEBRATION OF MARRIAGE.

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I. OF THE PERSONS WHO ARE OR ARE NOT BOUND TO SERVE AS CHURCHWARDENS.*

A person not inhabiting in the parish, though occupying lands in it, ought not to be appointed a churchwarden, because, if he attend to his duty where he inhabits, he cannot take notice of absence from church, nor disorders in it, in the parish in which he does not inhabit; see *Gibs. Cod.* 215.

All parishes are eligible to be churchwardens,† unless they be

* Churchwardens are the guardians of the church, and representatives of the body of the parish; 1 *Bla. Com.* 394. Strictly speaking, every churchwarden is also an overseer of the poor by the 43 *Eliz.* c. 2. and as such is joined with the overseers appointed by the justices in all matters relating to the poor. Overseers, however, are not specially appointed by act of parliament to superintend the poor; see *tit.* *Overseer.*

† If they have a legal capacity. It seems that a partner in a house of trade is not exempted from serving the office of churchwarden, from the circumstance of his not actually residing there; see *And.* on Churchwardens, 179. And in the case of *Ford v. Chauncey*, cited *And.* on Churchwardens, 182. in which it appeared that the party exercised the trade of linen-draper; the father occupied the house and kept it, the son lived as boarder with the father and was a partner; the rent was paid out of the profits of the business. The son was chosen churchwarden, and the Court held, that though he would not have been liable as an inmate, he was as a partner. So in the case of *Boken v. Zachary and Stevens*, cited *And.* on Churchwardens, 182. the defendants were elected churchwardens,

Peers members of parliament; Peers of the realm, by reason of their dignity, and members of parliament by reason of their duties in the House of Commons, are exempted from the office of churchwarden; see *Gibs. Cod* 215.

Clergymen Clergymen are exempted from the office of churchwarden, their other duties not being compatible with the due discharge of parochial business; see *Gibs. Cod.* 215; 6 *Mod.* 140.

Barristers, attornies; Counsellors nor attorneys ought not to be chosen churchwardens; and if they be, they may have a prohibition, by reason of their attendance in the court, at Westminster; see 2 *Rol. Abr.* 272.

Clerks in Court; Clerks of Chancery, King's Bench, Common Pleas, and Exchequer, by reason of their attendance in the courts, are ineligible from the duties of churchwardens; and, if elected, they shall have a writ of privilege out of the said courts to be discharged; *ibid.*

Apothecaries; By 6 & 7 W. 3. c. 4. apothecaries who have served seven years' apprenticeship shall be exempted from the office of churchwarden; and by the 5 *Hen.* 8. c. 6. and 32 *Hen.* 8. c. 40. physicians and surgeons in the city of London and its suburbs are exempted from the duties of churchwardens, because of their obligation to attend on the sick; see 18 *Geo.* 3. c. 15.

Dissenting ministers; By 1 W. 3. sess. 1. c. 18. dissenting teachers or preachers in holy orders, or pretended orders, being duly qualified, are exempted from the office of churchwarden.*

Catholic ministers; Roman catholic ministers are exempted, provided they conform to the 31 *Geo.* 3. c. 32. s. 8.

Visitors of workhouses; By 22 *Geo.* 3. c. 83. visitors of workhouses in incorporated districts are ineligible as churchwardens.

Papists, jews, children under 10 years; If a parish return a papist, jew, or child under ten years, the ordinary would be bound to reject him. *Per Lord Howell*, 1 *Hagg.* 10.

Persons convicted of felony; By 10 & 11 W. 3. c. 23. s. 2. all persons who have prosecuted felons to conviction are exempted from the office of churchwarden in the parish where the offence was committed; see 7 *East*, 174.

Served in the militia. Or registered seamen. By 42 *Geo.* 3. c. 90. s. 174. no sergeant, corporal, or drummer, of the militia, nor any private man, from the time of his enrolment until his discharge, shall be liable to serve as a peace or parish officer. So registered seamen not actually in service, are exempt by 7 & 8 W. 3. c. 21.

II. OF THE CHOICE† AND SWEARING OF.

(A) OF THE CHOICE OF.

(a) *Time of election.*

By the 89th canon churchwardens shall be chosen yearly in Easter week.

(b) *Place of election.*

The election of churchwardens should be holden in the vestry; see *Lane*, 21.

(c) *How many may be elected.*

Two churchwardens are generally chosen; and it seems from the 89th canon there must be more than one, because it uses the word *churchwardens*.

(d) *Manner of conducting the election.*

STOUGHTON v. REYNOLDS. T. T. 1736. cited 4 *Vin. Abr.* 527.

The election must not be adjourned unless the parishioners consent; In an action for a false return, a special verdict found the custom to be for the parishioners of — annually to elect a churchwarden; that S., the plaintiff, was elected by the parishioners to serve for churchwarden for the year 1734, and until another be chosen; that at a vestry the ensuiug year, he was re-elected by the parishioners, but at the vestry then holden, the vicar and one and Z. pleaded that he was an inhabitant of another parish, and S. set forth "that he was of the parish of C., and therefore that neither of them were of the parish for which they had been chosen; that in their house of trade a servant only slept;" but the Court held them liable; see *Stevenson v. Longston*, 1 *Const.* 379.

* And dissenters in general scrupling to take on them the office, may execute the same by deputy, to be approved of in like manner as other churchwardens; 1 *W. sess.* 1. c. 18.

† The Court of K. B. will not grant a *mandamus* to the churchwardens to compel them to call a vestry to elect their successors. Nor will they grant a *quo warranto* to try the validity of the choice; see 4 *T. R.* 382.

churchwarden adjourned the vestry to the next day, and the vicar then chose Chapman. A *mandamus* had been directed to — to admit and swear in the plaintiff. It was argued for the plaintiff, that the 89th canon of 1603, that all churchwardens and questmen shall be chosen by the joint choice of the minister and parish, if it may be; if not, then the minister to choose one, and the parish the other, has never been received as law, and cited Cro. Jac. 532; Warner's case, Cro. Car. 551; Hard. 378; and Carth. 118; where Holt, C. J. says, that where the incumbent chooses one, it is only by usage, and that a churchwarden is only a temporal officer. 437] therefore, where a churchwarden was elected after an adjournment by the vicar and one churchwarden, it was holden in valid.*

Per Lee, C. J. In all councils and elections, the general rule is, that the major part binds, and cited 18 E. 4. 2. and Hackwell's *Modus tenendi Parliamentum*. The question is, whether the adjourning by vicar, jointly with one churchwarden, was a valid and good adjournment, and he thought not; and that, if vicar and churchwarden had such a power, it must be by custom or by rule of common law; but no custom is found, nor is there any rule of common law to vest this power in the vicar, nor is it in the power of churchwardens to adjourn; and then the right is in the assembly itself.—Judgment for plaintiff. *Per Probyn, J.* The vicar is not a necessary party at the vestry.

(e) *Who may vote.*

1. By 89th canon; all churchwardens or questmen, in every parish, shall be chosen by the joint consent of the minister and the parishioners, if it may be; but if they cannot agree upon such a choice, then the minister shall choose one, and the parishioners another; and without such a joint or several choice, none shall take upon them to be churchwardens. Churchwardens are generally chosen by the parishioners and parson;†

2. HUBBARD v. PENRICE M. T. 1747. K. B. 2 Stra. 1246.

To a *mandamus* to swear in the plaintiff churchwarden of Heston in Middlesex; the defendant returned, that he was not duly elected. And in the course of the trial, the question was, in whom the common right of choosing churchwardens rests? The plaintiff insisted it was in the parishioners at large as to both, and would therefore have the burthen on the defendant to show a custom, or right in the parson, to name one; and cited Carth. 118; Noy. 139; for that purpose; the defendant on the contrary insisted, that of common right it was in the parson and parishioners, and therefore it lay on the plaintiff to prove a custom in the parishioners to choose both; and cited Cro. Jac. 532; Cro. Car. 551; Noy. 31; 1 Vent. 267. And of this opinion was the Chief Justice, who said, that though there were some pleadings to the contrary, yet they had never been regarded. The plaintiff therefore went on to prove a custom to choose both by the parishioners, but failed in it, it appearing, that though the parson had generally left it to the parishioners, yet he had sometimes interferred. The Chief Justice likewise held, that a curate stood in the place of the parson for the purpose of nominating one churchwarden; and cited 2 Vent. 41; that a curate may make a presentment. Or curate on behalf of the latter, unless there be a custom to the contrary.

3. ANON. H. T. 1673. K. B. 1 Vent. 267. [438]

A *mandamus* was granted to the archdeacon of N., to swear a churchwarden on surmise of a custom that the parishioners were to choose the churchwardens, and that the archdeacon had refused to administer the oath, notwithstanding he was elected according to the custom. The archdeacon returned, that *non sibi constat* that there is any such custom, (which form is not allowable; for it ought to be positive, whereupon an action might be founded), and that by the canon the parson is to choose one. &c. The Court said, that custom would prevail against the canon, and a churchwarden is a lay officer, and his power enlarged by sundry acts of parliament; and that it has been resolved, that he may execute his office before he is sworn, though it is convenient he should be sworn; and if the plaintiff here were sworn by a mandate from this Court, they advised him to take heed of disturbing him; Noy. Rep. 139.

* So in the absence of a custom, the majority of the electors, at the time of the election, cannot unduly shorten the period necessary for that purpose: *Rex v. The Commissioners of Winchester*, 7 East. 573. abridged post, "Election."

† In the election by the parishioners, the majority of those who attend the meeting on a written notice given for that purpose, bind the parish; see *Lanc*, 21.

Or that the minister shall choose one and the parishioners the other, is to be decided; but if the custom be not clearly proved, the election must be as directed by the preceding canon

4. CATTEN v. BARWICK. H. T. 1718. K. B. 1 Stra. 145.

By the 89th canon, churchwardens are to be chosen by the parson and parishioners jointly; and if they cannot agree, then one by the parson, and the other by the parishioners. In the parish of Bridge ——— in Yorkshire, the custom is, for the parson to appoint one, and the two old churchwardens the other, but it goes no farther. In this case the two churchwardens could not agree; so one presented Barwick, and the parishioners at large chose Catten. It was insisted for Barwick, that his case was like that of coparceners, where if they disagree, the ordinary may admit the presentee of which he will except the eldest alone presents. On the other side it was said, that the cases widely differed; for in the case of a presentment the ordinary has a power to refuse, but he has not so in the case of churchwardens, for they are a corporation at common law, and more a temporal than a spiritual officer. And a case was cited to be adjudged in B. R. where to a *mandamus* to swear in a churchwarden, the ordinary returned that he was *servus nimis idoneus*, &c. But a peremptory *mandamus* was granted, because the ordinary was not a judge in that case; the Court held, that by this disagreement, the custom was laid out of the case, and then they must resort to the canon; under which Catten being duly elected, they decreed for him 60l. costs.

5. THE CHURCHWARDENS OF NORTHAMPTON'S CASE. E. T. 1690. K. B. Carth. 11

[439] And if the parson who has a right to choose one churchwarden be under sentence of deprivation, the right of choosing both rests to the parishioners.

Mandamus to swear two churchwardens chosen by the parishioners of the parish of G. in the town of N.; the case was, that the vicar of that parish for the time being had usually chosen one of the churchwardens, but at this time he was under sentence of deprivation for not taking the oaths, &c. whereupon the parishioners proceeded to the election of two churchwardens, and presented them to be sworn; but the register of the Consistory Court, being a friend to the vicar, refused to swear them unless that person whom the vicar approved was nominated for one; and the Court said, under these circumstances, the right of choosing was in the parishioners, and granted the *mandamus*.

6. STUTTER v. FRESTON. E. T. 1718. C. P. 1. Stra. 52.

But if the parishioners do not appoint a churchwarden, the ordinary can not do it.

Prohibition was granted to the Spiritual Court, where it was libelled against the defendant for not appearing to take upon him the office of churchwarden, though thereunto appointed by the ordinary. And it was held, that though the parishioners and parson neglect ever so long to choose churchwardens, yet the ordinary has no jurisdiction; for churchwardens were a corporation at common law, and they are different from questmen, who were the creatures of the reformation, and came in by canon law. The 89th and 90th canons say, that churchwardens shall be chosen by the parson and parishioners, and if they disagree, then one by the parson and the other by the parishioners, *et alioquin non erunt*.

Per Cur. The proper way is to take a *mandamus*. *Sed vide Anon. post, 441.*

7. REX v. GUY. H. 1702. K. B. 6 Mod. 89; 2 Lord Raym. 1008; S. C. 3 Salk. 88.

The validity of the customs of choosing churchwardens.

A *mandamus* was directed to the official of ——— to swear in A. and B. churchwardens of the parish of ———. To this a return was, that they were "not duly chosen." And now a rule was made for a peremptory *mandamus*, for he should have complied with the writ as far as he could, and have sworn one of them, if the truth were that one of them only had been duly chosen, or else have returned that neither of them was chosen. But it was objected that this could not be done; for by the custom of the parish the parson was to choose one, and the parishioners the other; and the parishioners insisted on it that they should choose two, and did propose two, and the official could not tell which of them two to swear. Holt, C. J. Then you should have made a spe-

* In most of the parishes in London, the parishioners chose both churchwardens. And in all parishes erected under the 9 Anne, c. 22 the canon shall prevail inasmuch, as no custom can be pleaded in such new parishes; see Gibs. 215; Co. Lit. 112; 1 Ro. Abr. 389; Cro. Jac. 532. By the 58 Geo. 3. c. 45. two churchwardens of each church, built under that act, are to be chosen, one by the incumbent and one by the parishioners.

cial return that the parish claims a right to choose two; that these persons had an equal number of voices; that the parson had chosen his man, and so you could not swear either of the parishioners' men; or if the parish unanimously chose two jointly, when in truth they had a right but to choose one, that would be void as to both; and in that case you might return generally that neither of them had been chosen; and so where two have an equal number of votes. And at last, by direction of the Court, it was consented to, to try the custom in a feigned action.

8. *REX V. HARRIS*. T. T. 1763. K. B. 3 Burr. 1420.

Upon a *mandamus* to admit and swear churchwardens of St. Olave's, Southwark. The *mandamus* was directed to Dr. Harris, commissary of the consistorial and episcopal court of the bishop of Winchester, for the parts of Surrey; setting forth that Henry Griffith and Thomas Garner were in Easter week then last past duly nominated and elected churchwardens of the parish of St. Olave, Southwark, in Surrey; and that they had often offered themselves to the doctor to take their corporal oath as churchwardens, and requested to be by him sworn and admitted into the said place and office; which oath the said doctor refuses to administer to them: the writ, therefore, commanded him, without delay, to swear and admit, or cause to be sworn and admitted, the said Henry Griffith and Thomas Garner. A like *mandamus* was also directed to him to swear and admit David Griffin, Philip Cox, Isaac Applebee, and Wm. Strickland, into the same office. He returned, that there were two causes depending before him, which had been afterwards consolidated into one; in which it was disputed, "who were elected churchwardens;" the former, on the promotion of Griffin, Cox, Applebee, and Strickland, asserting themselves to have been duly elected, and praying to be sworn; the latter, on the promotion of Griffith and Garner, and two others, against Griffin, Cox, Applebee, and Strickland; and the parties on each side reciprocally denied the others to be duly elected. By reason whereof he could not, consistently with his duty, and the law and practice of the episcopal court, swear and admit, or cause to be sworn and admitted, the said Henry Griffith and Thomas Garner, into the place or office of churchwardens of the parish of St. Olave, Southwark, until it shall have been judicially determined, in the cause then depending before him, according to allegations given and proofs made thereon, "that the said Henry Griffith and Thomas Garner were duly elected into such office." The return to the other writ of *mandamus* at the instance of David Griffin, Philip Cox, Isaac Applebee, and William Strickland, was the same (*mutatis mutandis*); only that it added at the end (after the words "were duly elected into such office") "by a majority of legal votes."

Per Cur. This is an indecent return. He has no right to try the question; he cannot try the legality of the votes. The king's writ commands him to admit and swear, and he must obey it. It was then observed, that there were two cross *mandamuses*; and that the doctor did not know which to obey. He ought to obey both. It is without prejudice to the right of either claimant.

9. *MORGAN V. THE ARCHDEACON OF CARDIGAN*. H. T. 1695. K. B. 1. Salk. 166. And the Spiritual Court cannot examine into the eligibility of the party elected.

Mandamus to the archdeacon to swear in a churchwarden, being duly elected; the archdeacon made this return, that he was a poor dairyman, and unqualified for the office, and thereupon a peremptory *mandamus* was awarded; for the churchwarden is a temporal officer, he has the property and custody of the parish goods; and as it is at the peril of the parishioners, so they may choose and trust whom they think fit; and the archdeacon has no power to elect or control their election.

(f) *Mode of compelling an election.*

ANON. H. T. 1727. K. B. 1 Stra. 686.

The court was moved for a *mandamus* to be directed to the churchwardens of St. Botolph, Bishopsgate, commanding them to call a vestry in Easter week, for the election of churchwardens; but the court refused it, saying there was no instance of such a *mandamus*, and that they could not take notice who had a *mus*.

right to call the vestry, and consequently did not know to whom it should be directed. See 2 Lord Raym. 1379. 1405; 1 Vent. 267.

(B) OF THE SWEARING.*

The Spiritual Court will compel a churchwarden to take the oath of office, before the archdeacon of the diocese.

1. COOPER v. ALNUTT. Const. Court. H. T. 1820. 3 Phill. Rep. 165.

This suit was instituted to compell Alnutt, one of the churchwardens of the parish of B., in the city of London, to take the churchwarden's oath of office, he having been duly elected by the parish. It appeared that he refused on the ground of deafness; but the Court held the defence insufficient, and directed him to take upon himself the office of churchwarden, and to take the oath before the proper ordinary.

By the canon law, the archdeacon of the diocese is to swear and admit churchwardens; see 1 Bac. Abr. 371.

2. GOSLIN v. ELLISON. H. T. 1692. K. B. 1 Salk. 330.

Who is not, it seems, or Litchfield's court against churchwardens, for a fee for swearing them, and tithed teany fee.

A prohibition was moved for and granted to stay a suit in the archdeacon of Litchfield's court against churchwardens, for a fee for swearing them, and tithed teany fee. The Court was moved afterwards to discharge the rule, but the motion was refused: it being insisted, that no fees could be due, but by custom for work done; in which case an action might be brought on a *quantum meruit*.

And if he refuses to swear the churchwardens, a *mandamus* lies to compel him.

3. REX v. RICE. H. T. 1696. K. B. 5 Mod. 325; S. C. 12 Mod. 166; 1 Ld. Raym. 216; S. C. 3 Salk. 90; Camb. 417; S. C. Carth. 393; S. C. 1 Ld. Raym. 138. S. P. REX v. HENCHMAN. T. T. 1726. K. B. Ca. Temp. Hard. 130.

To a *mandamus* to the archdeacon to swear in churchwardens, he returned that the person chosen as such was an improper person, being a poor dairyman, *et minus habilis* to be a churchwarden. But the Court said: a churchwarden is a temporal officer; and being such, it is the duty of the archdeacon to swear him when chosen, without inquiry into his ability. For why should he determine as to his fitness, rather than those who are most concerned in interest, the parishioners? A peremptory *mandamus* issued.

And the *mandamus* is not answered by a return that he was inhibited by the bishop of L., unless he states he is the bishop of the diocese.

4. REX v. SIMPSON. M. T. 1739. K. B. 1 Stra 610; S. C. 8 Mod. 325; S. C. 2 Ld. Raym. 1379.

To a *mandamus* directed to the archdeacon of Colchester, to swear R. F. into the office of churchwarden, he returned, that before he received the writ, he received an inhibition from the bishop of London, with a signification that he had taken on himself to act in the premises.

Per Cur. The return is ill. It does not appear that the town of Colchester is within the diocese of the bishop who inhibits; besides, the archdeacon is but a ministerial officer, and is obliged to do the act, whether it is of any validity or not. A peremptory *mandamus* was accordingly granted.

5. REX v. TWITTY. M. T. 1702. K. B. 7 Mod. 8.

Formerly a return that the individual was not duly chosen, was good.

On a *mandamus* to swear in A. and B. as churchwardens, suggesting that they were in due manner elected: the return was, that A. and B. were not in due manner elected. It was objected, that it ought not to be in due manner; but that it ought to be in the disjunctive, nor was either of them elected.

Holt, C. J. resolved: 1st. That one cannot be sworn on this writ; for either both were chosen, or the writ is misconceived. 2d. Where the writ is to swear one in due manner elected, that he was not in due manner elected is a good return, for it is an answer to the writ; but where it is to swear one elected churchwarden, there that he was not in due manner elected is naught; because it is out of the writ, and evasive.

6. REX v. WHITE. M. T. 1729. K. B. 2 Ld. Raym. 1379; S. C. 8 Mod. 325. S. P. REX v. HARWOOD. T. T. 1726. K. B. 8 Mod. 380; S. C. 2 Ld. Raym. 1405.

But a different rule has obtained.

On a *mandamus* directed to the archdeacon, to swear in a churchwarden, he returned, he was not elected; on this matter coming before the Court, *Fortes-*

* Persons elected as churchwardens refusing to take the oath according to law, shall be excommunicated, see Gibs. 216; though he is not disqualified from acting before he is sworn; see Vent. 267

cue, J. said, that it was settled, and had been often ruled, that the archdeacon could not judge of the election, and therefore this return was ill. Whereon a peremptory *mandamus* was granted.

7. *REX V. HARWOOD*. T. T. 1728. K. B. 2 Ld. Raym. 1405; S. C. 8 Mod. 380.

To a *mandamus* directed to the defendant Dr. Harwood, as commissary of the dean and chapter of St. Paul's, commanding him to swear William Folbigg, one of the churchwardens of the parish of St. Giles, Cripplegate, London, being duly elected, &c. the defendant returned he was not elected. And it was insisted on behalf of Folbigg that the return was ill; that the archdeacon, who was only to return the writ, could not judge of the election, and therefore on such a return a peremptory *mandamus* was granted last Michaelmas term. That the archdeacon could not judge of the qualities of a person chosen by the parish; Hil. 8 W. 3; the *King v. Rice*, 5 Mod. 325. But both *Raymond*, C. J. and *Reynolds*, J. held the return to be good. [443]

But on the impertinency of Folbigg's counsel, who pressed the authority of the case of the *King v. White*, and no counsel for the defendant appearing, a rule was made for a peremptory *mandamus*, nisi, &c. At which *Raymond*, C. J. and *Reynolds*, J. were much dissatisfied; and the defendant's counsel at another day coming to show cause against the rule, they discharged it. But the Court not being unanimous, it was ordered to come on again in the paper; but was never stirred again. *Raymond*, C. J. however, still retained his former opinion, that the return was good. Vide 2 Ld. Raym. 1405.

8. *REX V. HARRIS*. T. T. 1763 K. B. 3 Curr. 1420; S. C. 1 Blac. 430.

On a *mandamus* directed to Dr. Harris, commissary of the Consistorial and Episcopal Court of the bishop of Winchester, directing him to admit and swear in H. G. and T. G. churchwardens of St. Olave's, Southwork, they being duly elected, &c. A like *mandamus* was also directed to him, to swear and admit D. G., P. C., J. A., and W. S., into the same office. To the first writ the Doctor returned, that there were two causes depending before him, which had afterwards been consolidated into one; in which, it was disputed, "Who were elected churchwardens;" the former, on the promotion of G., C., A., and S., asserting themselves to have been duly elected, and praying to be sworn; the latter on the promotion of G. and G. and two others, against G., C., A., and S., and the parties on each side reciprocally denied the others to be duly elected. By reason whereof, and of the law and practice of the Episcopal Court, he could not swear or admit the said H. G. and J. G. into their office till it had been judicially determined before him, that the said H. G. and T. G. were duly elected. To the other writ of *mandamus* at the instance of D. G., P. C., J. A., and W. S., was the same return, only it was added at the end, (after the words, "were duly elected into such office,") "by a majority of legal votes. The Court observed, that the Doctor ought to obey both writs; it being without prejudice to the right of either claimant. And that all the cases proved this return to be wrong. It would be so, even if he could try it; (which he cannot do;) he cannot try the legality of the votes. Therefore let the return be disallowed, and a peremptory *mandamus* issue.

A return that a cause is pending relative to the validity of the election before commissary of, &c. is not good, because the commissary cannot try that point,

III. DUTIES OF.

(A) IN GENERAL.*

It is the duty of the churchwardens to superintend the binding poor children out as apprentices; see vol. 2. *ante*, p. 10.

The churchwardens are bound to provide for bastards, whose sustenance the parish have made no provision for, and this without an order of justices: see *Hays v. Bryant*, 1 H. Bl. 253. abridged *ante* vol. 4 p. 189.

* It is the duty of the churchwardens to take care of the benefice during its vacancy; and as soon as there is any avoidance, they are to apply to the chancellor of the diocese for a sequestration, which being granted, they are to manage all the profits and expences of the benefice for him that succeeds, plough and sow his glebes, gather in tithes, thrash out and sell corn, repair houses, &c., and they must see that the church be duly served by a curate approved by the bishop, whom they are to pay out of the profits of the benefice; see 2 Inst. 499. stat. 18 and 14; Car. 2. c. 12; Show, P. L. 99.

As to apprentices.
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Bastards;

- Church-bells;** By the 88th canon, churchwardens are to keep the keys of the belfry, and not suffer them to ring without proper cause.
- Brief money;** By the 4 Ann. c. 14. churchwardens are to collect the charity money upon briefs; see *ante*, vol. 4. p. 727
- Burials;** It is the duty of the churchwardens not to suffer a person to be buried in their parish when he died in another see *ante*, vol. 4. p. 769.
- Butter and cheese;** The penalties under the 13 & 14 Car. 2. c. 26. for reforming abuses on butter and cheese, are to be demanded by the churchwardens of the parish where the offence is committed.
- Certificates** It is the duty of churchwardens, together with the minister to sign certificates of persons receiving the sacrament for the purpose of qualifying them to hold offices; see 25 Car. 2. c. 2.
- Chimney-sweepers;** By the 28 Geo. 3. c. 48. churchwardens are to superintend the binding boys as sweeps, and to observe that their masters do as the act directs; see *ante*, tit. Chimney Sweep.
- Churches;** As to their duty relative to churches, see *ante*, tit. Churches and Chapels.
- Church-yards;** As to their duty relative to church-yards, see *post*, tit. Church-yard.
- Conventicals;** Churchwardens are to levy the penalties by warrant of a justice, under the 22 Car. 2. c. 1.
- Drunkenness;** Churchwardens are to receive the penalties under 4 Geo. 1. c. 5.; 21 Geo. 2. c. 7.; and 1 Jac. 1. c. 9.; for drunkenness.
- Fast-days;** Churchwardens are bound to mind that the fast days appointed by public authority are kept; see 2 & 3 Edw. 6. c. 19; 5 Eliz. c. 5.
- Game;** By the 1 Jac. 1. c. 27. churchwardens are to receive the penalties imposed by that statute.
- Gaming;** The churchwardens shall receive the penalties for servants, labourers, apprentices, &c. gaming in public houses; see 20 Geo. 2. c. 24.
- Greenwich Hospital;** Churchwardens are bound to sign certificate of pensioners out of Greenwich Hospital, under 3 Geo. 3. c. 16.
- Hawkers and pedlars;** Churchwardens are bound to apprehend and receive the penalties under the 9 & 10 W. 3. c. 27. and 9 Geo. 2. c. 28.
- Non-conformists;** Churchwardens are to levy the penalty of 12*d.* on persons not coming to church each Sunday, under 1 Eliz. c. 2.
- Parsons;** It is the duty of the churchwardens to observe that the parson reads the thirty nine articles twice a year, and the canons once in the year, preaches every Sunday good doctrine, reads the common prayer, celebrates the sacraments, preaches in his gown, visits the sick, catechises children, and marries according to the law, and not to suffer strange parsons to preach in their church; see canons 50 & 52.
- Parishioners;** By canon 117, churchwardens are to see that the parishioners come to church, &c.
- [445] **Pawnbrokers;** Churchwardens are to prosecute pawnbrokers who offend against the statute; 39 and 40 Geo. 3. 99.
- Poor;** Churchwardens are to act in conjunction with the overseers of the poor.
- Registers;** Churchwardens are bound to furnish register books, as prescribed by the 52 Geo. 3. 146; see tit. Parish.
- Sabbath;** Churchwardens are to levy penalties on all persons who break the Lord's days; see 29 Car. 2. c. 7.
- Tipling;** The churchwardens are to levy the penalty for tipling; see 1 Jac. 1. c. 9.
- And weights and measures;** Churchwardens are to levy the penalties for selling by wrong weights and measures; see 22 Car. 2. c. 8. 22 Geo. 2. c. 8.
- (B) IN PARTICULAR.
- (a) To account.
- At the end of the year the churchwardens are to yield accounts,** 1. By the 89th canon all churchwardens at the end of their year, or within a month at the most, shall; before the minister and the parishioners, give up a just account of such money as they have received, and also what particularly they have bestowed in reparations and otherwise, for the use of the church; and, last of all, going out of their office, they shall truly deliver up to the parishioners whatever money or other things, of right belonging to the church or

parish, which remaineth in their hands, then it may be delivered over by them and delivered to the next churchwardens, by bill indented. [446]
 remains in their hands to the new churchwardens,* Accounts of disbursements merely of an ecclesiastical nature ought to be allowed by the Spiritual Court; Unless they have been passed at a vestry;

2. STYRROP V. SPOCKLES M. T. 1631. K. B. 12 Mod. 9.

Adjudged, that if money is disbursed by the churchwardens, for repairing the church, or any thing else, merely ecclesiastical or spiritual; the spiritual courts shall allow their accounts; but if there is any thing else, that is an agreement between the parishioners, the succeeding churchwardens may have an action of account at law, and the Spiritual Court has no jurisdiction of the same.

3. SNOWDEN V. HERRING. M. T. 1730 Ex. Bunb. 289. S. P. NUTKINS V. ROBINSON. H. T. 1727. Ex. Bunb. 247.

On motion to discharge a rule to show cause why a prohibition should not go where churchwardens had passed their accounts at a vestry, the court held that the Spiritual Court could not afterwards proceed against them to account on oath.

4. WAINBRIGHT V. BAGSHAW. E. T. 1735. K. B. 2 Stra. 974; S. C. 7 Mod. 208; S. C. 2 Ld. Raym. 421; S. C. And. 11; S. C. Cunn. 33.

The churchwardens were cited into the Bishop's Court of Litchfield to account; they pleaded that they had accounted at the vestry according to law, which was rejected, and a prohibition granted; for the ordinary is not to take the account; he can only give a judgment that he accounts; and to what purpose should they be sent back to those who have taken their account already? The same rule was made in the exchequer, Easter, 2 Geo. 2. between Haughton and others, churchwardens of St. Alban, Wood-street.

5 ADAMS V. RUSH. T. T. 1740. K. B. 2 Stra. 1133. S. P. LEMAN V. GOULTY, *infra*.

Per Cur. The Spiritual Court has no jurisdiction to settle a churchwarden's accounts; and a prohibition was granted, after a sentence allowing the accounts, and an appeal to the Arches.

6. LEMAN V. GOULTY. H. T. 1789. K. B. 3 T. R. 3.

Churchwardens being cited in the Bishop's Court to exhibit on oath a true account of all sums of money which they had received and paid in the execu-

* Churchwardens being also overseers of the poor, it will be proper to notice here the 17 Geo. 2. c. 68. which regulates the mode of their accounting, and enacts, that "the churchwardens and overseers of the poor shall yearly and every year within 14 days after other overseers shall be nominated and appointed to succeed them, deliver in to such succeeding overseers a just, true and perfect account in writing, fairly entered in a book or books to be kept for that purpose, and signed by the said churchwardens and overseers, of all sums of money by them received, or rated and assessed, and not received, and also of goods, chattels, stock, and materials that shall be in their hands, or in the hands of any of the poor in order to be wrought, and of all moneys paid by such churchwardens and overseers so accounting, and of all other things concerning their said office; and shall also pay and deliver over all sums of money, goods, chattels, and other things as shall be in their hands, unto such succeeding overseers of the poor; which said account shall be verified by oath, or by the affirmation of persons called quakers, before one of his majesty's justices of the peace, which said oath or affirmation such justice or justices is and are authorized and required to administer, and to sign and attest the caption of the same at the foot of the said account, without fee or reward; and the said book or books shall be carefully preserved by the churchwardens and overseers, or one of them, in some public or other place in every parish, town, or place; and they shall and are required to permit any person there assessed, or liable to be assessed, to inspect the same at all reasonable times, paying sixpence for such inspection, and shall upon demand forthwith give copies of the same, or any part thereof, to such person, paying at the rate of sixpence for every three hundred words; and in default of yielding up an account, and delivering over money and goods, &c. in their hands as aforesaid, they may be committed to the common gaol by two or more justices of the peace, until they shall have given such account, and yielded up such money, goods, &c. The 50 Geo. 3. c. 49. requires the churchwardens and overseers to submit their accounts to two justices at special sessions to be holden within the 14 days appointed by the 17 Geo. 2. c. 68. for the delivering in the accounts to the succeeding overseer. This clause, however, has been holden not to be a substitution in lieu of the provision in the 17 G. 2. but is cumulative; and if the overseer refuse to deliver in such accounts to the succeeding overseers within 14 days, he may be committed by a justice for such refusal; 16 East, 374.

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tion of their office, which, at a subsequent court they accordingly did; when objections were taken to two articles of the account, which were disallowed, and they were admonished to pay a certain sum as the balance of their accounts, and a certain other sum as the costs; and for not appearing at a subsequent court, and obeying the monition, the judge pronounced them contumacious, and excommunicated them. But on motion for a prohibition, the Court held, that although the Spiritual Court might compel the churchwardens to deliver in their accounts, they could not decide on the propriety of the charges made therein; and when they had delivered in their accounts, they had done every thing which that court had the power of enforcing, and there was an end of their jurisdiction; it was *functus officio*; and if they took any step afterwards, it was an excess of jurisdiction, for which a prohibition would be granted, even after sentence.

It is the duty of the churchwardens to make the rate after notice, the parishioners do not attend the vestry. And where churchwardens have neglected to make a prospective rate for securing a sum of money necessary to the completion of repairs to the parish church, or ordered by them pursuant to a resolution entered into at a vestry meeting, they are liable for the payment of them, and are not entitled to contribution from the parishioners attending the meeting and signing the resolution sanctioning the repairs being made.

(b) *To make rates.* See ante, p. 422. et seq.

1. ANON. T. T. 1673. K. B. 1 Vent. 367.

Motion for a prohibition to a suit in the Ecclesiastical Court, for a Churchwardens' rate, suggesting that they had not made it with the consent of the parishioners. The Court said, that the Churchwardens might make a rate for the repairs of the church, if the parish were summoned, and refuse to meet, or make a rate; because, if the repairs were neglected, the Churchwardens are liable, and not the parishioners.

2. LANCHESTER V. TRICKER. E. T. 1823. C. P. 1 Bing. 201.

To assumpsit for money paid, laid out, and expended, the defendant pleaded, that the contract was made jointly with 26 other persons not joined. Replication negating the non-joinder, and stating that the defendant contracted alone. At the trial it appeared that the plaintiff and defendant were Churchwardens of the parish of B.; and the tower of the Church at that time being in a dilapidated state, it was ordered at a vestry meeting, at which 20 other parishioners, besides the plaintiff and defendant attended, "that the Churchwardens should be authorised to put a new roof on the tower." At another vestry meeting, attended by the plaintiff and 15 other parishioners, it was resolved, "that the model produced by T. is satisfactory to the vestry, and that he is ordered to put a new roof on the tower, according to the model produced; and at the completion of his business, two builders be employed to value the same, and examine the work; likewise, that the Churchwardens be requested to employ such persons as they think competent to estimate the injury done to the tower and bells, and employ such other assistants as they shall think necessary for the repair of the tower." And at another vestry meeting, attended by both plaintiff and defendant, and 18 other parishioners, a resolution similar to the former was again passed, and signed by the parties present. In pursuance to these resolutions, the plaintiff and defendant, as Churchwardens, proceeded to order and complete the repairs of the tower; but various disputes having arisen as to the mode of carrying the repairs into execution, and the plaintiff having been unsuccessful in enforcing a rate attempted to be made by him for the purpose of defraying the expenses, which had been opposed by the defendant, and having been also unsuccessful in proceedings instituted by him in the Court of Chancery for the recovery of them, brought the present action against the defendant, for the amount of the moiety of the bills paid by him; thereupon the plaintiff obtained a verdict, subject to the opinion of the Court, whether the parties named in the plea were, or were not, jointly liable with the defendant. On a motion for a new trial, *Per Cur.* From the course of proceeding adopted by these parties, they have no legal demand upon the parishioners collectively; and as the plaintiff and defendant jointly ordered these repairs, they are jointly liable to pay for them. The plaintiff having discharged the whole of the expense, he has a right to call upon the defendant for his proportion. The principle contended for, that all those persons who subscribed their names to the orders of vestry, are liable to contri-

* But the parishioners when assembled may make a rate, though the churchwardens vote against it; see 1 Bac. Ab. 378.

bute in equal proportions would, if sanctioned, render it necessary that every parishioner should be joined in the action. The persons present, and who did sign, were acting merely as vestrymen, and affixed their signatures to the order in that character, not intending to make themselves individually liable. —Rule refused. See 5 Mad. 4; 12 East. 556; post, 449.

3. *REX V. THE CHURCHWARDENS OF ST. PETER'S THETFORD.* T. T. 1793. K. B. 5 T. R. 364. [448]

On an application for a *mandamus* to compel the defendants, as Churchwardens, to make a rate for the repairs of the Church, the Court refused to interfere, on the ground that it was a matter purely cognizable in the Ecclesiastical Courts.

4. *REX V. THE CHURCHWARDENS AND OVERSEERS OF THE POOR OF THE SEVERAL PARISHES OF ST. MARGARET AND ST. JOHN, WESTMINSTER.* T. T. 1815. K. B. 4 M. & S. 250.

It appeared that the Church of A. was one of the 50 Parish Churches built pursuant to 9 Ann. c. 22; and the parish was divided and taken from that of St. Margaret in conformity with the act; but no perpetual division of the parishes, according to the mode prescribed in sec. 22. was made, and the rates of the two parishes continued joint. The Parish Church of St. John became ruinous, and required repair, the expense of which, upon a survey made, was estimated at 8500*l.*; upon which the Churchwardens and Overseers of St. John's caused notice to be given to the Churchwardens and Overseers of St. Margaret, that they would meet them in vestry on a certain day, to take into consideration and ascertain the monies to be paid for the repairs of the said Church, and to divide and apportion the same. No attention having been paid to this notice by the Churchwardens of St. Margaret, a rule nisi was obtained for a *mandamus* to the Churchwardens and Overseers of these two parishes, to summon a meeting of the Churchwardens and Overseers, and of the vestry, or principal inhabitants of the two parishes, for the purpose mentioned in the above notice. The Court said, that by the act the burden seemed to be cast on the united parishes, for they were first to agree upon and ascertain the gross sum to be assessed within the limits of the original parish, for the several purposes mentioned, and thus to divide and apportion the same, upon every part, according to the value of the lands and estates therein assessable: and although a *mandamus* does not lie to the Churchwardens to make a Church rate, which is properly of ecclesiastical cognizance, the rights and powers of which are saved by the act, yet it lies in this case to assemble a vestry pursuant to the 24th section of 11 Anne, for the purpose of agreeing upon and ascertaining the monies and rates to be assessed for the repairs of the Church. See 5 T. R. 364.

5. *REX V. THE CHAPELWARDENS OF THE TOWNSHIP OF HAWORTH IN THE PARISH OF BRADFORD.* T. T. 1810. K. B. 12 East. 556.

Motion for a *mandamus* to the defendants to make a rate upon the inhabitants of their township for levying a certain sum of money, being one-fifth part of a church rate charged upon the parish at large, for reimbursing the churchwardens of the town of Bradford such sums as they had expended, or might there after expend, on the parish church of B. and to pay the 50*l.* when raised to those churchwardens. For the defendants it was argued, that no rate could be made to reimburse churchwardens, for they were not bound, nor ought they, to lay out money till they had collected it in hand, for otherwise they might lay out more than was allowed by the justices, and then charge the parish for the excess; and *non constat*, that it is to reimburse them what they have expended in the same year; it may have been for expenses incurred many years ago by other churchwardens for former inhabitants, and it makes no difference that it is a rate to reimburse the same churchwardens by whom the money was expended. The Court said: the regular way is for the churchwardens to raise the money beforehand by a rate made in the regular form, for the repairs of the church, in order that the money may be paid by the existing inhabitants at the time, on whom the burden ought properly to fall. And although it may be perhaps

A *mandamus* does not lie to compel them to make a rate.

But altho' the Court will not interfere by *mandamus* to compel the churchwardens to make a church-rate which is properly of ecclesiastical cognizance yet it lies to the churchwardens of two united parishes to assemble a meeting, in order to enquire whether it be fit that a rate should be made.

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A rate to reimburse churchwardens for such sums as they had expended, or might hereafter expend, is bad, for being retrospective.

urged that the rate is not merely to reimburse former but also to provide for future expenditure, that therefore the objection that has been made is more a matter of form than of substance, and that consequently the Court may grant the *mandamus* in the common form without noticing the purpose of reimbursement; yet we cannot accede to such arguments, for the demand made upon the defendants was to make a rate in the form in which the rule is drawn up, to reimburse the churchwardens of Bradford for money which they had expended, as well as for what they might expend, and the refusal of the defendants to make such a rate applies to the form of the demand, and we cannot now qualify their refusal. See *And. 11*; and *Rep. Temp. Hardw. 381*; *2 Ld. Raym. 1009*; *2*

It is the duty of church wardens *P. Wms. 63*; *Prec. Chan. 42*; *1 King. 201*; *5 Mad. Rep. 4*; *post, p. 456*; *458*, and *ante, p. 447*.

(a) *To present.*

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to present whatever is presentable by the ecclesiastical authority of the county.
THE CHURCHWARDENS OF ST. BOTOLPH'S, LONDON, CASE. Carth. 151. Newton, one of the churchwardens of St. Botolph, libelled A. for stopping the church doors and windows by sheds, &c. built upon part of the churchyard. A prohibition was prayed, on the ground that the churchwardens ought to have presented in the temporal Courts. But the Court refused the prohibition, deeming any nuisance to the church properly matter of ecclesiastical cognizance.

IV. RIGHTS OF.

It seems that the churchwardens have a right of refusing to suffer a wardmote to be holden in the church; see *2 Lord Raym. 777*; *7 Mod. 29*; *Holt. 331*; *2 Salk. 425*. And they are entitled to lay out the parish money as they please, provided they do not do it imprudently and improvidently; hence, if it be laid out truly and honestly, they have a right to be reimbursed, and the parishioners have no remedy in the absence of fraud or deceit, because the parish have made them their trustees. But, if they act imprudently, complaint must be made to the ordinary, who will interpose; see *Gibs. 196*. Churchwardens have no power to interfere in the administration of divine service, for this is the immediate province of the rector or vicar, subject to the cognizance of the ordinary; see *And. on Churchwardens, 199*.

V. LIABILITIES OF.

1. *REX v. GRIFFIN. H. T. 1734 K. B. 7 Mod. 197*; *S. C. 2 Barn. 368*; *S. C. 1 Sess. Ca. 257*.

Churchwardens may be guilty of a libel, by publicly summoning the parish
The defendants, churchwardens of the parish of Lambeth, having been convicted on an information tried at Surrey assizes for libel, in giving public notice in the church, thereby desiring the parishioners to meet and assist them in correcting several abuses which, by reason of the pretended authority of the trustees appointed by the parish for the management of the workhouse there, had been suffered to be committed. It was insisted, among other arguments, that

* By the 116th and 117th canons, twice in the year at the visitations of the bishop, archdeacon, or other ordinary, churchwardens are to make their presentments according to certain articles given to them, with a view to their direction in these particulars, of all such things as are amiss within their respective parishes. This they may do if they think fit oftener, but cannot be compelled except at such visitations as aforesaid. They are to make these presentments, not only from their own knowledge, but also from common fame; so that, if there be a common fame within the parish of one, that he lives incontinently, is a common swearer, or in any other particular contained in the articles, is a breaker of the laws of the church, the churchwardens are bound to present him at the next visitation, that inquiry may be made thereinto: *Prid. Direct.*

In the event of their neglecting or refusing to present any of the above particulars, of which there is such a common fame through the parish as aforesaid, they may be compelled thereunto by the bishop at his visitation; and if they still persist in refusing, they may be proceeded against in the Ecclesiastical Court as wilful breakers of their oath, and in the interim may be debarred of the communion by the minister of the parish; *Can. 26. 117*. In the event also of the churchwardens refusing or neglecting to present any of the particulars aforesaid, with a view to the suppression of profaneness and immorality, the minister himself may present; *Can. 113*. But his presentments must be upon oath; see *2 Vent. 42*.

this was no libel:—and the Court said, it cannot be taken upon this information: to correct that this is a charge on the trustees of any breach of public trust, the erection pretended of this workhouse, and the government thereof, not appearing to be by act of parliament or any public authority, but a breach of a private trust reposed in them by the parishioners; and any such charge is equally punishable as a libel.—See *Delaney v. Jones*, ante, vol. i. p. 301; and *Brown v. Croome*, id. workhouse. 302.

2. *Rex v. Eyres*, H. T. 1665. K. B. Sid. 307.

The defendant was indicted for having accepted a silver cup from J. G. for placing him in the situation of gallery keeper of one of the galleries of the church, of which he, the defendant, was churchwarden. On the part of the defendant it was contended, that the place of gallery-keeper was not an office, but only an employment, which belonged to the churchwarden, or any one under him; and if any one thought fit to give him a present for being there, it was not indictable: but the Court held the indictment sustainable, and refused to quash it.

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So they are liable to an indictment if they receive money by corrupt means, or by extor- sive colors officii, during the time they are in of-

VI. DISABILITIES OF.*

1. By the 55 Geo. 3 c. 137. s. 6. it is enacted that no churchwarden or overseer of the poor, or other person in whose hands the collection of the rates for the relief of the poor, or the providing for, ordering, management, control, or direction of the poor of any parish, township, hamlet, or place, shall be placed jointly with, or independent of, such churchwardens and overseers, or any of them, by virtue of any act of parliament, shall, either in his own name, or in the name of any other person, provide or supply for his or their own profit, any goods, material, or provisions, for the use of any workhouse, or otherwise for the support and maintenance of the poor in any parish, township, hamlet, or place, for which he or they shall retain such appointment; nor shall be concerned directly or indirectly in furnishing or supplying the same, or in any contract relating thereto, under pain of forfeiting the sum of £100. with full costs of suit to any person who shall sue for the same, by action of debt, or on the case, in any of his majesty's courts of record at Westminster. Provided nevertheless, that if it shall happen in any parish, township, hamlet, or place, that a person or persons competent and willing to undertake the supply of any of the articles or things required for such workhouse, or for the use of the poor there, cannot be found within a convenient distance therefrom, or than and except some or one of the churchwardens and overseers of the poor, or other person having the ordering, managing, control, or direction of the poor in such parish, township, hamlet, or place, then and in every such case it may be lawful for any two or more neighboring justices of the peace (proof thereof being first duly made before them upon oath,) and which oath such justices, or any of them, are authorized and empowered to administer, by certificate under their hands and seals, to permit and suffer any one or more of such churchwardens and overseers, or any such persons as aforesaid, to contract and agree for the furnishing and supplying of any articles or things which may be required for such workhouse, or otherwise for the use of the poor of such parish, township, hamlet, or place, during the time which he or they may retain such appointment, any thing herein contained to the contrary notwithstanding; and such certificate shall be entered with the clerk of the peace, or town clerk, of the county, city, town, or district, in which such person or persons shall reside. and a copy thereof left with them, for which entry every such clerk shall receive 1s. and no more; and from that time, every person and persons named in any such certificate shall be discharged from any penalty to which he or they would otherwise be liable under this act, for furnishing or supplying any such articles or things as aforesaid; and in case any action or suit for the re-

No church- warden shall, in his own name, or in the name of a ny other person, sup- ply for his own profit, any goods, &c. for the use of any workhouse, or for the support of the poor; on pain of forfeiting 100l.

Unless the com- modities cannot be obtained within a convenient distance.

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* Churchwardens are in general incapable of purchasing lands in their own parish; see Co. Lit. 3. a, App. 7. In some parishes, by custom, a different rule obtains. And by the 9 Geo. 1. c. 7. churchwardens are entitled, with the consent of the minister and parishioners, to purchase a workhouse for the use and habitation of the poor of their respective parishes; see Sug. V. & P. 431. 3d ed.

covery of any such penalty as aforesaid, shall be commenced against any person or persons to whom such certificate shall have been granted as aforesaid, it shall and may be lawful to and for such person or persons to plead generally, that he or they was or were duly discharged from any liability to such forfeiture, by a certificate granted according to the provisions of this act; and upon due proof being given of such certificate, and of such entry thereof as aforesaid, the jury shall find a verdict for the defendant in such action or suit; and if the plaintiff or plaintiffs shall become nonsuited, or discontinue his, her, or their action; or if verdict shall pass against him, her, or them, on demurrer; then the defendant or defendants in such action shall have double costs, and have such and the like remedy for the recovery of the same as any defendant or defendants have or hath in recovering costs of suit in any other case by law.

2. *POPE v. BACKHOUSE*. E. T. 1818. C. P. 8 Taunt. 239; S. C. 2 B. Moore, 186.

And this prohibition applies even though he furnish the goods at a fair market price.*

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Debt on the stat. 55 Geo. 3. c. 137. s. 6. against a farmer for penalties incurred by providing corn and flour for the support of the poor of the parish of which he was churchwarden, the same being the produce of his farm. It was argued that the price charged by the defendant was a fair marketable price. *Gibbs. C. J.* held, that the defendant was within the terms of the act, as though he might have sold his goods at a reasonable price, he must necessarily acquire some profit by the sale. He observed, however, that the case might be different if a churchwarden or overseer, who had brought up provisions at a certain price, should, in a time of scarcity, furnish the poor at the same prices at which he had purchased them.

VII. OF THEIR AUTHORITY BEING JOINT OR SEVERAL.

Churchwardens must act jointly and together; for what one does without the other has no legal operation; therefore a release by one is no bar to an action by the other; see *Cro. Jac.* 234; *Yelv.* 173; so one churchwarden cannot dispose of the goods of the parish: see *Gro. Jac.* 234; nor can both; see *Yelv.* 173; 1 *Roll.* 393; unless the parish consents; 1 *Roll.* 393. But one may present without doing it in conjunction with the other.

VIII. OF DISPLACING OR REMOVING THE CHURCHWARDENS.

Churchwardens may be removed for misconduct or misbehaviour; see *Lamb, Off. Ch. sect. 3.*

IX. AS TO THE TIME THEY CONTINUE IN OFFICE.

Churchwardens in general continue in office one year; but, by 118th canon it is directed that they shall remain in office till the new churchwardens be sworn,

X. REMEDIES BY AND AGAINST.

(A) OF ACTIONS BY.

(a) *When they may sue.**

DENT v. PRUDENCE. M. T. 1730. K. B. 2 Stra. 832.

Churchwardens can bring no actions after their year

In 1725, during the time Prudence and Bond were churchwardens of St. Matthews in Ipswich, a rate was made for the repairs of the church; and the

† And where a defendant, a guardian of the poor, sold sheep to a party who had the contract for providing for the poor, it was holden that it was a case within the words of 55 Geo. 3. c. 137. *West v. Andrews*, 5 B. & A. 328; S. C. 1 B. & C. 77. abridged *post*, tit. Overseer. But in the case of *Procter v. Manwaring*, 3 B. & A. 145. abridged *post*, tit. Overseers; it was determined, that as the above act only prohibits churchwardens or overseers from supplying the workhouse or the poor generally, it does not apply to a case where an overseer receiving an order for the relief of J. S. an individual pauper, paid J. S. part in money and by the consent of J. S. gave her the remainder in goods from his shop.

* Churchwardens are taken to be for some purposes a kind of corporation, therefore, they may maintain trespass or other possessory action against any person who wrongfully

appellant Dent not paying his share, the churchwardens, after their year was out, cited Dent to compel a payment; and he appearing, insisted to be dismissed, for that the suit was not begun in their time. But the judge decreeing him to answer, he appealed to the Arches; when the judge pronounced against the decree to answer, because there was a contestation of suit, but retained the cause. From thence Dent appealed to the Delegates. And on a hearing, 17th December, 1729, before the Bishops of Norwich and Carlisle, Chief Justice Raymond, Baron Carter, Sir Henry Prentice, and other doctors of civil law, it was determined, that Dent should be dismissed; and that prudence and Bend, who can sue only in a politic capacity, could not institute any suit after that capacity was gone. It was agreed, that if the suit had been begun within the year, they might have proceeded in it after their year was out, it being of necessity to prevent people from delays, in order to wear out the year. So is 1 Danv. Abr. 788; Cro. Eliz. 145. 179; 1 Leon. 177; and Dr. Prideaux's Directions to Churchwardens, 60. 61. But in regard this suit was not commenced till the year was out, and no precedents were shown to warrant it, the appeal was dismissed.

(b) in what manner to sue.

WARD V. BRAMATON. T. T. 1693. C. P. 3 Lev. 362. S. P. GREEN V. POPE. M. T. 1696. K. B. 1 Ld. Raym. 127.

This was an action by the plaintiffs, as churchwardens, for a false return to a *mandamus*. After verdict for the plaintiffs; a motion was made in arrest of judgment, on the ground that the plaintiffs ought not to have joined in the action, inasmuch as the tort to one is not the tort to the other. But the Court said, they ought to sue jointly, for they always act jointly; and the whole charge being joint, the action was brought for the unjust return, whereby they were put to the charge of the *mandamus*.

(c) Declaration by.

If the damage for which the action is brought were done in the churchwardens' own time, then they may lay the action either in *damnum parochianorum*, or in *damnum ipsorum*. But if the injury were done in the time of their predecessors, they must lay it only in *damnum parochianorum*; Cro Eliz. 145.

(B) OF ACTIONS AGAINST.

1. By the 7 Jac. 1. c. 5. and 21 Jac. 1. c. 12. if any action be brought against any churchwardens for any thing done by virtue of their office, they may plead the general issue, and give the special matter in evidence.

By 12 W. 3. c. 11. s. 12. reciting, "and whereas many churchwardens and overseers, and other persons entrusted to receive collections for the poor, and other public monies relating to the churches and parishes whereunto they belong, do often mispend the same, to the prejudice of such parishes, and of the poor and other inhabitants thereof; and the parishioners who are the only persons sometimes who can make proof thereof, have not been allowed to be witnesses against them; it is enacted, that in all actions to be brought in any court at Westminster, or at the assizes for the recovery thereof, the evidence of the parishioners, other than such as receive alms, shall be taken and admitted; see 1 Phil. Ev. 97. 3d ed.

By the 7 Jac. 1. c. 5. and 21 Jac. 1. c. 12. if any action be brought against any churchwardens, or persons called "sworn men," executing the office of churchwarden, for any thing done by virtue of their office; and a verdict be given for them, or the plaintiff shall be nonsuited, or discontinued, in every such case the judge before whom the said matter shall be tried, shall allow to the defendant his double costs.

2. HARPER V. CARR. M. T. 1797. K. B. 7 T. R. 448.

Trespass against a churchwarden for taking an anchor as a distress for non-takes the goods of the church; see 11 H. 4. 12. a; 1 Roll. 57; 1 Bac. Ab. 372. ante, 417; or who defaces a monument; Godb. 279. But they cannot maintain an action for entering or taking the profits of lands given to the use of the parish; 12 H. 7. 29. a; nor sue for a legacy or thing never in their possession; Com. Dig. tit. Eglise, F. 8.

† But their successors must do it; Wats. c. 39; hence, their successors may maintain an action for goods taken in the time of their predecessors; 12 H. 7. 28. a.

but if it be commenced before its expiration, they may proceed after the year is out.

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One churchwarden can not sue in his own name, with out joining the other.

In actions against churchwardens, they may plead the general issue. And the parishioners may give evidence against them.

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But if the plaintiff fails, the churchwardens are on double costs;

Provided he obtain a certificate, which may be granted at any time.* payment of a poor rate; the plaintiff being nonsuited, a rule was obtained to show cause why the defendant should not have double costs as directed by the 7 Jac. 1. On showing cause it was urged that the defendant could not be entitled to double costs without a certificate from the judge who tried the cause; and of that opinion were the Court, who said, the judge was bound to grant it, and that it might be procured at any time.

3. *HARPER V. CARR.* E. T. 1797. K. B. 7 T. R. 270.

By the 24 Geo. 2. c. 44. it is enacted, that no action shall be brought against any constable, headborough, or other officer, &c. for any thing done in obedience to any warrant under the hand or seal of any justice of the peace, until the demand in writing hath been made, &c. by the party intending to bring such action, &c. of the perusal and copy of such warrant, and the same has been refused, &c. and in case, after such demand and compliance therewith, &c. any action shall be brought against any such constable, headborough, or other officer, &c. without making the justices who signed or sealed the said warrant, defendants; that on producing or proving such warrant at the trial of such action the jury shall give their verdict for the defendant, notwithstanding any defect of jurisdiction in such justices, &c. Trespas having been brought against the churchwarden for taking an anchor as a distress for non-payment of a poor rate, and the plaintiff having recovered a verdict, the judge who tried the cause being of opinion that a churchwarden distraining for a poor's rate, was not within the protection of the act; a motion was made for leave to enter a nonsuit: and the Court said, the rule must be made absolute, a churchwarden being within the meaning of the words *other officer*, in the statute. and therefore that the action having been brought against the churchwardens alone, they were entitled to a verdict on proving the warrant of the magistrates, for the magistrates ought to have been made parties to this action.

(C) OF THEIR RELIEF IN EQUITY.

Formerly a court of equity would decree a rate to be made to reimburse a former churchwarden moneys laid out whilst in office: thus, in *Nicholson and Masters*, 4 Vin Abr. 529. on a bill against 90 parishioners, by the executrix of one of the churchwardens of Woodford, to be reimbursed money laid out by the testator as churchwarden, for rebuilding the steeple of the church, it was objected that this matter was proper for the Ecclesiastical Court, and not for this court. But by *Harcourt, Chancellor*, it was decreed, that the parishioners should reimburse the plaintiff the money laid out by her testator, with costs of his suit; and that the money should be raised by a parish rate. So in the case of Radnor parish, in Wales, cited 4 Vin. Ab. 534. But in the case of Lancaster v. Thompson, 5 Mad. 4. the Vice Chancellor expressly refused to decree a rate to reimburse a former churchwarden, observing: "a plaintiff who comes into this court to have a church-rate made for his benefit, necessarily admits that his case is such that he has no remedy in the courts of ordinary jurisdiction, and he is bound to make out a special case entitling him to equitable relief. In the *King v. the Chapel-wardens of Bradford*, (abridged *note*, p. 449) it was holden, that a retrospective rate cannot be legally made, because this would be to shift the burden from the parishioners at the time to future parishioners. A court of equity, in this respect, must follow the law; and it can be no ground of relief here that a party has failed to use due dili-

* In *Kercheval v. Smith*, Cro. Car. 285. an action was brought against the churchwardens for a false or malicious presentment, on common fame of incontinency. A verdict was found for defendant, on motion that they might have double costs under the 7 Jac. 1; it was resolved that it was not within the statute, for it was a matter merely ecclesiastical; and the statute was never intended to give double costs, but where men are vexed concerning temporal matters which they shall do by virtue of their office, and not for presentments concerning matters of fame. So the statutes do not extend to actions against them for non-feazance, such as the non-payment of money laid out for the support of one of their paupers by another parish; *Atkins v. Banwell*, 3 East, 92. abridged *post. tit. Overseer*. Nor are they entitled to double costs on a judgment, as in case of a nonsuit in an action brought against them for the price of goods sold and delivered to them for the use of the poor: *Blanchard v. Bramble*, 8 M. & S. 131.

gence. Bill dismissed. And in the case of *French v. Dear*, 5 Ves. 547. on a bill by a former churchwarden against the parish officers, trustees of an estate for the poor of the parish, and 40 inhabitants, to be reimbursed money laid out on account of the trust under an order of vestry, his accounts being passed, and an order made for payment, the Lord Chancellor expressed a strong opinion against such a bill, but it was dismissed on the ground of informality.

XI. REMEDY BY ONE CHURCHWARDEN AGAINST ANOTHER.

1. TURNER V. BAYNES. M. T. 1795. C. P. 2 H. Bl. 559.

In an action of *assumpsit* by the churchwarden of the parish of S. against a former churchwarden, it appeared that the usage of the parish had been for the vicar to choose one churchwarden, and the parishioners the other. But disputes having arisen, both the plaintiffs were chosen by the parishioners at Easter, 1794, and continued in office till Easter, 1795, during which time, viz: in Hilary term, 1795, the action was brought against the defendant, who had been churchwarden from Easter, 1790, to Easter, 1791 and who had admitted a sum of money to be in his hands on the balance of his accounts at Easter, 1791, when he went out of office. The court were clearly of opinion that the action was maintainable by the plaintiffs on two grounds; first, that being admitted and sworn into office, and acting as churchwarden, the defendant, who was a wrong doer in withholding the money, should not be permitted to deny their right to bring the action, and 2d, that churchwardens being a corporation for taking care of the goods of the church, the right to sue for money withholden from the parish, passed from one set to another, it being perfectly immaterial whether the immediate, or any other successors of the defendant, brought an action which was not founded in privity between them.

2. ASTLE AND ANOTHER V. THOMAS AND BALDWIN. H. T. 1823. K. B. 1 B. & C. 271; S. C. 3 D. & R. 492.

Declaration in *assumpsit* for money had and received to the use of the plaintiff as churchwardens of the township of B. by the defendants being the late churchwardens of that township. Plea by the defendant Thomas, *non assumpsit*. Plea by the defendant Baldwin, that two other persons, naming them, ought to have been joined as defendants. It appeared at the trial, that in the parish of B. there is but one mother church, although there are two sets of churchwardens; that one set is appointed for the township, and another for the hamlets, and separate rates had always been made by them; and that the defendants, being the late churchwardens for the township, had retained a certain sum of money in their hands. It was objected, on the part of the defendants, that the two churchwardens for the hamlets ought to have been joined with them as defendants; but the learned judge over-ruled the objection, and the jury found a verdict for the plaintiff. A motion was made for a rule for a new trial. and the objection urged at the trial was again advanced, when it was contended that there could not in law be more than one rate for a parish, and consequently, although the two sets of churchwardens had been accustomed to make two assessments, they in law did but amount to one.

Per Cur. We must hold that in this parish, in which there are two purses supplied from two distinct church-rates, the in-coming churchwardens for one division can sue the outgoing ones for a sum of money retained in their hands, without joining the churchwardens of the other division as plaintiffs or defendants. There has not, in this case, been any injury done to all the churchwardens, or to the whole parish, but only to that part of it which the plaintiffs represent. The rule must be therefore refused. Rule refused. See 1. C. & A. 542.

3. REX V. ROTHERHITHE. M. T. 1726. K. B. 8 Mod. 339; S. C. Show. P. L. 196.

Motion for a *mandamus* to succeeding churchwardens to make a rate to re-

* But a declaration in an action by churchwardens against their predecessors, charging them with having received several sums of money, not stating the sums particularly, is bad; *Bishop v. Eagle*, 11 Mod. 186; S. C. 10 Mod. 22. abridged *ante*, vol. 1. p. 141-g.

compel churchwardens to make a rate to reimburse their predecessors.

And after sentence to compel present churchwardens to make a rate to reimburse their predecessors, the Court will grant a prohibition, since the Ecclesiastical Court has no such power.

imburse the old ones, who had expended several sums in maintaining the poor. But it was denied on the authority of *Tawney's case*, 2 Salk. 531; which determined that a *mandamus* did not lie to overseers to make a rate to reimburse their predecessors. *Vide ante*, p. 447, *et seq.*

4. *DAWSON v. WILKINSON*. T. T. 1738. K. B. Ca. Temp. Hard. 382.

On a motion for a prohibition after sentence, in a suit in the court of the archdeacon of ———, in which sentence was given upon a citation for the parishioners to allow the churchwardens' accounts that the succeeding churchwardens should make a rate to reimburse the former, for money to be by them expended for the former, for money by them expended for the parish, and not paid, because the Ecclesiastical Court has no power to decree such a rate; 1 Roll. Rep. 73. *Bishop's case*; and *Wainwright v. Pagshaw*, Easter, 7 Geo. 2. were cited; when Lord Hardwick said that the ordinary's jurisdiction, in these cases, extends only to compel the churchwardens to account before the parishioners, and no farther. It was urged on the other side, that the Ecclesiastical Court has jurisdiction as to the churchwardens' accounts; it has power to do every thing incident to it; *Yelv. 173. Starkey v. Barton and Gore*. And it was likewise objected to this motion, that as this is for a prohibition after sentence, the suggestion ought to be verified by affidavit.

Page, Justice. The Ecclesiastical Court has no power but to decree an account, and then the account must be audited; but they have no power to order a rate to be made to reimburse; so in *Tawney's case*. The churchwarden had disbursed money out of his pocket, upon a sudden emergency of a great sickness in the town, and yet the court would not help him. As to the want of an affidavit in this case; it is not necessary, because the want of a jurisdiction appears upon the face of the proceedings below: the churchwardens are always supposed to have raised money enough to pay themselves, and therefore can in no case be ordered a reimbursement. Let the rule for granting a prohibition be made absolute.

Church-yards.

(A) AS RELATES TO ENLARGING AND ALTERING CHURCH-YARDS AND BURIAL GROUNDS, p. 459.

(B) ————— BUILDING IN CHURCH-YARDS, p. 460.

(C) ————— THE BOUNDARIES OF CHURCH-YARDS, p. 460.

(D) ————— REPAIRING CHURCH-YARDS, p. 461.

(E) ————— TREES GROWING IN CHURCH-YARDS, p. 461.

(F) ————— WAYS THROUGH CHURCH-YARDS, p. 462.

[459] (A) AS RELATES TO ENLARGING AND ALTERING CHURCHYARDS AND BURIAL GROUNDS.*

The commissioners are to enlarge and alter churchyards and burial grounds, if necessary requires it;

On giving notice to the churchwardens,

Who are to call a vestry;

By 59 Geo. 3. c. 134. s. 36. it is enacted, that all such parishes and extra-parochial places, as shall be required by the commissioners, shall furnish lands for enlarging their churchyards or burial grounds, or for making such additional church-yards or burial grounds, as to the commissioners shall seem necessary. And that, as soon as the commissioners shall have fixed upon any parish or extra-parochial place as being one in which it is necessary that the churchyard or burial ground shall be enlarged, or that a new burial ground shall be made, they shall give notice to the churchwardens of their intention to enlarge such churchyard or burial ground, or to set out a new burial ground, and of the extent of ground which will be required for any such purpose, and for making a proper access and approach thereto, and the part of the parish or extra-parochial place within which the same is required to be provided. And the said churchwardens shall, within the space of 14 days, call a meeting of the vestry of the parish or extra-parochial place, for the purpose of taking all such measures as may be necessary for the providing such additional churchyard or burial ground, and approach thereto as aforesaid; and in case such parish or extra-parochial place shall not be able to provide the same without

* A church-yard or burial ground is an enclosure adjoining, or apart from the church, wherein the dead are buried; see 2 Inst. 489; *ante*, tit. Burial.

purchase; then the vestry, or persons possessing, as aforesaid, the powers of Which an vestry, shall, and are hereby required forthwith, to proceed to treat for a piece largment of ground and approach thereto, according to such notice, but shall not con- is to be con- clude any bargain for the same without the approbation of the commissioners. secrated. By the 38th section the piece or parcel of ground so to be added, as aforesaid, And in or to the ancient churchyard or burial ground is to be consecrated, and the free- der to make hold thereof to vest in the person or persons in whom the freehold of the an- such an- cient churchyard or burial ground was vested. By the 39th section the said largment commissioners are authorised to alter, repair, pull down, and rebuild the walls fences and and fences of any existing churchyard or burial ground, and to fence off with walls may walls, or otherwise, any additional or new burial ground,, and also to stop up be pulled down, and discontinue, or alter, or vary, any entrance or gate leading into any church yard or burial ground, and the paths, footways, and passages thereto; provided that the same be done with the consent of two justices of the peace of the county, city, town, or place, where any such entrance, &c. shall be stopped up or altered, and no notice being given, in the manner and form prescribed by an act passed in the 55 G. 2. c. 68.. By the 58 G. 3. c. 45. s. 80. a highly No burial important and beneficial enactment is made, that it shall not be lawful to break is to be made in up the pavement, or to open the soil beneath the same, within any church, or the church, chapel to be erected under the provisions of that act, for the purposes of burial, or to make any grave in any cemetery or churchyard thereunto adjacent or be- Unless it be longing, at any distance less than 20 feet from the external walls of such in a vault. church or chapel respectively. Provided always, that nothing herein shall ex- [460] tend, or be construed to extend, to prevent the burial of dead bodies in any vault wholly arched with brick or stone, which may have been constructed for such purposes, under any church or chapel, and to which the only access shall be by steps on the outside of the external walls thereof. And if any burial shall take place, or any grave be made, otherwise than is herein provided, the person or persons ordering or causing the same to be made, shall, for every Lands to be such offence, on conviction thereof, &c. forfeit and pay the sum of 50*l*. By purchased stat. 3 G. 4. c. 72. s. 26. it is enacted, that it shall be lawful for the commis- for the en- sioners (therein mentioned) to authorise and empower any parish, chapel, town- largment of church- ship, or extra-parochial place, which shall be desirous of procuring a burial yards; ground, or adding to any existing church or chapel, yard or cemetery, to procure and purchase any such land or ground as may, in the opinion of the commissioners, be sufficiently and properly situated for a church or churchyard or burial ground, or as in addition to any existing church or churchyard or cemetery (whether such land or ground shall be situated within the parish or place for the use of which the same shall be intended), and to make, raise, levy, and collect rates, for purchase thereof, or for the repayment, with interest, of any money borrowed for the making such purchases, at such time and in such proportions as shall be agreed upon with the person or persons advancing any such money, and approved of by the said commissioners; and when any such land or ground, so purchased, shall be situate out of the bounds of the parish or place for which the same is intended, the same shall, after consecration, The person become and be deemed part of such parish or place, any thing in any act of and the pa- law or custom to the contrary notwithstanding. rishioners may refuse

(B) AS RELATES TO BUILDING IN CHURCHYARDS.

1. THE RECTOR OF ST. GEORGE'S. HANOVER SQUARE V. STEWART. H. T. 1739. K. B. 2 Stra. 1126.

The parish were cited in the Bishop's Court of London, to show cause why in the a license should not be granted to S. to erect a charity school on part of the church- churchyard. On motion for a prohibition, at the instance of the rector and parishioners, the Court granted it, on the ground that the Ecclesiastical The free Court had no jurisdiction. and could not compel them unless they consented. hold being in the per- son, unless

2. ANON. H. T. 1681. K. B. 2 Show. 184.

It was resolved by the Court that the parson has a freehold in the church- there be a custom to the court ry. yard, unless there be a custom enabling the churchwardens to take the money for breaking open the same,

What are
the bounds
ries of a
church-
yard is a
question of
law,
[461]

Church-
yards are to
be kept in
repair
By the pa-
rish.*

And an in-
dictment
lies for the
non-repair,

The Spirit-
ual Court
cannot de-
cide to
whom the
trees be-
long.†
[462]

(C) AS RELATES TO THE BOUNDARIES OF CHURCH-YARDS.

PEW v. THE CHURCHWARDENS OF ST. MARY, ROTHERHITHE. E. T. 1734. K. B. 2 Stra. 1013.

The plaintiff was libeled in the spiritual Court for a nuisance and encroachment on the churchyard, to which he pleaded, that he was owner of four tenements, which formerly stood on the ground in question, and that his present building was on the old foundation, and did not project beyond. And this not being a matter triable there, a prohibition was granted; for though interrupting the use of a churchyard, as a churchyard, is properly cognizable in the Ecclesiastical Court, yet the bounds of it which is a matter of freehold, ought not to be determined there.—See *F. N. B. 51. A*; 2 *Roll. Abr. 137. pl. 4*; 1 *Roll. 12.*

(D) AS RELATES TO REPAIRING CHURCH-YARDS.

1. By the 85th canon the churchwardens or questmen shall take care that the church-yards be well and sufficiently repaired, fenced, and maintained with walls, rails, or pales, as have been in each place accustomed, at their charge unto whom the same appertaineth. *Lord Coke* says, this is to be done at the expense of the parishioners; 2 *Inst. 489* see *Lind. 253.*

2. **REX v. REYNELL, CLERK. E. T. 1805. K. B. 6 East, 315.**

A vicar was indicted for not repairing the fence of a church-yard, which he had been immemorably bound to repair; by means whereof cattle broke in and injured tomb-stones, &c. to the nuisance of the parishioners. A verdict being found for defendant, a rule was obtained to set it aside, on the ground that it was contrary to evidence; but the Court refused to interfere, leaving the plaintiff to indict again for any continuing want of repair.

(E) AS RELATES TO TREES GROWING IN THE CHURCH-YARD.

HILLIARD v. JEFFRESEN. E. T. 1697. K. B. 1 Ld. Raym. 212.

A person libelled against the defendant in the Spiritual Court for having cut elms in the church-yard; but a prohibition was granted, upon suggestion that they grew on his freehold.

(F) AS RELATES TO WAYS THROUGH CHURCH-YARDS.

Although the church-yard be the parson's a man may prescribe to have a way through it; see 2 *Roll. Abr. 265.* But no one can make a private door into the church-yard, without the consent of the minister, and a faculty also from the bishop; *Par. L. 88-9.*

* Unless the owners of lands adjoining to the church-yard have from time immemorial repaired any part thereof attached to their ground; in that case the churchwarden may compel them to repair, &c.; see 2 *Roll. Abr. 287*; *Gibs. 194.*

† *Roll. (2 Abr. 337.)* seems to think they belong to the party who is bound to repair, which opinion is consistent with the stat. 35. *Edw. 1. s. 2.* entitled, "*Statutum ne rector prosternat arbores in cameterio*;" because we do understand that controversies do oftentimes grow between parsons of churches and their parishioners, touching trees growing in the church-yard, both of them pretending that they do belong unto themselves; we have thought it good rather to decide this controversy by writing than by statute; and that, forasmuch as a church-yard that is dedicated is the soil of a church, and whatsoever is planted belongeth to the soil, it must needs follow, that those trees which be growing in the church-yard are to be reckoned amongst the goods of the church, of which laymen have no authority to dispose, but as the holy scripture doth testify, the charge of them is committed only to priests to be disposed of. And yet seeing those trees be often planted to defend the force of the wind from hurting the church, we do prohibit the parsons of the church, that they do not presume to fell them down unadvisedly, but when the chancel of the church doth want necessary reparation; neither shall they be converted to any other use, except the body of the church doth need like repair, in which the parsons of their charity shall do well to relieve the parishioners, with bestowing upon them the same trees, which we will not command to be done, but we will commend it when it is done. But if it appear that the person whose right they are intends to cut them down for other purposes than repairing the chancel, a prohibition will be granted to hinder waste, and so likewise to hinder the cutting down of such trees in the church-yard as are for the defence of the church." And if the trees be actually cut down by any person for any other use than is here specified, it is thought that he may be indicted and fined upon this statute; 11 *Co. 49*; *Gibs. 208.* In *Stratcy v. Francis, 2 Atk. 217.* a motion was made on behalf of the plaintiff, who was patron of the living, against the rector, for an injunction to stay waste, in cutting down timber in the church-yard. By the Lord Chancellor Hardwicke

Cinque Ports.

Cinque ports are those havens which lie towards France, and were anciently vigilantly guarded. In this respect they have a special governor called the Lord Warden of the Cinque Ports, who acts as admiral, and sends out writs in his own name; see 4 Inst. 222.

The cinque ports are Dover, Sandwich, Romney, Winchelsea, and Rye, and to these may be added Hythe and Hastings, which are reckoned as part or members of the cinque ports; though, by the first institution, it is said that Winchelsea and Rye, were added as members, and that the others were the cinque ports; there are also several other towns adjoining, that have the privileges of the ports. These cinque ports have certain franchises to hold pleas, &c., and the king's writs do not run there; 4 Inst. 223.

There are several courts within the cinque ports; one before the constable; others within the ports themselves, before the mayor and jurats; another, which is called *curia quinque portuum apud Shepway*. There is likewise a court of chancery within their districts, to decide matters of equity; but no original writs issue thence. The jurisdiction of the cinque ports is general, extending to personal, real, and mixed actions; and if any erroneous judgment is given in the cinque ports before any of the mayors and jurats, error lies according to the custom, by bill, in nature of error, before the Lord Warden of the Cinque Ports, in his court of Shepway; 4 Inst. 224.

In the cinque ports the process is directed to the constable of Dover castle, his deputy, or lieutenant; see 1 Tid. 172 7th ed.

The cinque ports cannot award process of outlawry; see Cro. Eliz. 9. 10. Nor does a writ of error lie at common law, in the K. B. or C. P. upon a judgment pronounced in the cinque ports, though a *quo minus*; Cro. Eliz. 911; and a *certiorari* issues to the cinque ports; 2 Hawk. P. C.; 4 Inst. 224. Alleging that the cause of action arose in a cinque port is a good plea to the jurisdiction of the superior court.

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Circuits.

These are divisions of the kingdom appointed for the judges to visit after Hilary and Trinity terms, for the trial of prisoners and causes. Two of the judges attend every circuit, one presiding in the criminal and the other in the civil court. Each circuit comprehends several counties. The *Home Circuit*, Hertford, Essex, Kent, Sussex, and Surrey. The *Midland Circuit*, Northampton, Rutland, Lincoln, Nottingham, Derby, Leicester, and Warwick. The *Norfolk Circuit*, Bucks, Bedford, Huntingdon, Cambridge, Norfolk, and Suffolk. The *Oxford Circuit*, Berks, Oxford, Hereford, Salop, Gloucester, Monmouth, Stafford, and Worcester. The *Northern Circuit*, York, Durham, Northumberland, Cumberland, Westmorland, and Lancashire. And the *Western Circuit*, Southampton, Wilts, Dorset, Devon, Cornwall, and Somerset.

These circuits are made twice a year in the respective vacations, except the *Home Circuit*, where the judges make three annual visitations.

The officers belonging to the different circuits are, the clerk of assize, associate, clerk of arraigns, clerk of indictments, judges, marshal, crier, steward, and tipstaff.

Circuit of Action. See ante, vol. i. p. 199.

Circumstantial Evidence. See tit. *Evidence*.

Citation. See tit. *Ecclesiastical Court*.

“a rector may cut down timber for the repairs of the parsonage house or the chancel, but not for any common purpose; and this he may be justified in doing by the statute of 35 Edw. 1. If it is the custom of the country, he may cut down underwood for any purpose; but if he grabs it up it is waste. He may cut down timber likewise for repairing any old pews that belong to the rectory; and he is also entitled to botes for repairing barns and outhouses belonging to the parsonage.” An injunction was granted till the hearing of the cause, to stay the rector from cutting down timber, except in particular instances before mentioned.

City. See tit. *London*

Clandestine Removal. See tit. *Fraudulent Removal*.

Clausum fregit. See tit. *Process; Trespass*.

Clearing-house. See tits. *Banker; Bills and Notes; Check*.

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Clergy. See tit. *Ecclesiastical Persons*.

Clergy, benefit of.*

(A) AS TO THE PERSONS WHO MAY DEMAND IT, p. 464.

(B) AS TO WHAT CRIMES IT IS DEMANDABLE, p. 467.

(C) AS TO WHEN IT IS TO BE DEMANDED, p. 472.

(D) IN WHAT MANNER IT IS TO BE DEMANDED, p. 473.

* Where a man has committed a crime which subjects him to a capital punishment, he may in certain cases (see *post*), claim the benefit of clergy, whereby he suffers a mitigated punishment.

Anciently the law held, that no man should be admitted to the privilege of clergy but such as had the *habitus et tonsuram clericalem*; see 2 Hale, P. C. 372. But in process of time a much wider and more comprehensive criterion was established; every one that could read (a mark of great learning in those days of ignorance, and her sister superstition) being accounted a clerk or clericus, and allowed the benefit of clerkship, though neither initiated in holy orders, nor trimmed with the clerical tonsure. But when learning, by means of the invention of printing, and other concurrent causes, began to be more generally disseminated than formerly, and reading was no longer a competent proof of clerkship, or being in holy orders; it was found that as many laymen as divines were admitted to the *privilegium clericale*; and therefore, by statute 4 Hen. 7. c. 13. a distinction was drawn between mere lay scholars and clerks that were really in orders. And, though it was thought reasonable still to mitigate the severity of the law with regard to the former, yet they were not put upon the same footing with actual clergy, being subjected to a slight degree of punishment, and not allowed to claim the clerical privilege more than once. Accordingly the statute directs, that no person once admitted to the benefit of clergy, shall be admitted thereto a second time, unless he produces his orders; and in order to distinguish their persons, all laymen who are allowed this privilege shall be burnt with a hot iron in the brawn of the left thumb. This distinction between learned laymen, and real clerks in orders, was abolished for a time by the statutes 28 Hen. 8. c. 1. and 32 Hen. 8. c. 3; but it is held (Hob 294: 2 Hale, P. C. 375) to have been virtually restored by stat. 1 Edw. 6. c. 12. which statute also enacts, that lords of parliament and peers of the realm, having place and voice in parliament, may have the benefit of their peerage, equivalent to that of clergy, for the first offence (although they cannot read, and without being burnt in the hand), for all offences then clergyable to commoners, and also for the crimes of house breaking, highway robbery, horse stealing, and robbing of churches. After this burning, the laity, and before it, the real clergy, were discharged from the sentence of the law, and delivered over to the ordinary, to be dealt with according to the Ecclesiastical Canons. Whereupon the ordinary, not satisfied with the proofs adduced in the Profane Secular Court, commenced a canonical trial; requiring the oaths of 12 compurgators. But this spiritual enquiry was abolished by the 18 Eliz. c. 7. which enacts, that for the avoiding the perjuries and abuses incident to such an investigation, after the offender has been allowed his clergy, he shall not be delivered to the ordinary as formerly; but, upon such allowance and burning in the hand, he shall forthwith be enlarged and delivered out of prison; with proviso, that the judge may, if he think fit, continue the offender in goal for any time not exceeding a year. Thus the law continued, for above a century, unaltered; except only that the statute of 21 Jac. 1. c. 6. allowed that women convicted of simple larceny under the value of 10s. should (not properly have the benefit of clergy, for they were not called upon to read; but) be burned in the hand, and whipped, staked, or imprisoned, for any time not exceeding a year. And a similar indulgence by the statutes 3 & 4 W. & M. c. 9; and 4 & 5 W. & M. c. 24. was extended to women guilty of any clergyable felony whatsoever, who were allowed once to claim the benefit of the statute, in like manner as men might claim the benefit of the clergy, and to be discharged upon being burned in the hand, and imprisoned for any time not exceeding a year. The punishment of burning in the hand being found ineffectual, was also changed by statute 10 & 11 W. 3. c. 23. into burning in the most visible part of the left cheek, nearest the nose; but such an indelible stigma being found by experience to render offenders desperate, this provision was repealed about seven years afterwards, by stat. 5 Ann. c. 6. and till that period, all women, all peers of parliament and peeresses, and all male commoners, who could read, were discharged in all clergyable felonies; the males absolutely, if clerks in orders, and other commoners, both male and female, upon branding, and peers and peeresses without branding, for the first offence; yet, all liable (excepting peers and peeresses) if the judge saw occasion, to imprisonment not exceeding a year. And by the same statute 5 Anne,

(E) WHO IS TO JUDGE WHETHER THE PERSON WHO DEMANDS IT HAS A RIGHT TO IT, p. 473.

(F) AS TO WHETHER IT SHALL BE ALLOWED WHERE IT IS NOT DEMANDED, p. 473.

(G) CONSEQUENCE OF ITS BEING ALLOWED, p. 473.

(H) AS TO THE NUMBER OF TIMES IT WILL BE ALLOWED, p. 474.

(A) AS TO THE PERSONS WHO MAY DEMAND IT.

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1. By the 25 Ed. 3. c. 4. which reciting that the prelates had grievously complained that secular clerks, as well chaplains as other monks and other people of religion, had been drawn and hanged by award of the secular justices, in prejudice of the franchise of the holy church, &c. doth enact that all manner of clerks, as well secular as religious, &c., shall freely enjoy the privilege of holy church, &c. The interpretation this act has received, and the benefit of progressive changes made in the law connected with the benefit of clergy, by successive legislative enactments, have been pointed out and commented upon in the subjoined note, and from which it may be collected, that all persons, whether they are able to read or not, and women as well as men, are, at the present day, entitled once to receive the benefit of clergy in all crimes where it is allowed; and, instead of being condemned to die, may be sentenced to a discretionary penalty, (*vide* note.) But although all persons guilty of clergyable offences were thus equally entitled to such a privilege on the first transgression, it was enacted, that the benefit of clergy should be granted to all those who were entitled to ask it, without requiring them to read by way of conditional merit. And experience having shown, that so very universal lenity was frequently inconvenient, and an encouragement to commit the lower degrees of felony, and that though capital punishments were too rigorous for these inferior offences, yet no punishment at all (or next to none), was as much too gentle; it was further enacted by the same statute, that when any person is convicted of any theft or larceny, and burnt in the hand for the same according to the house of correction, or public workhouse, to be there kept to hard labour, for any time not less than six months, and not exceeding two years, with a power of inflicting a double confinement in case of the party's escape from the first. And it was also enacted by the statutes 4 Geo. 1. c. 11. and 6 Geo. 1. c. 23. that when any persons shall be convicted of any larceny, either grand or petit, or any felonious stealing, or taking of money, or goods and chattels, either from the person or house of any other, or in any other manner, and who by the law shall be entitled to the benefit of the clergy, and liable only to the penalties of burning in the hand or whipping; the Court in their discretion, instead of such burning in the hand or whipping, may direct such offenders to be transported to America (or by stat. 19 G. 3. c. 74. to any other parts beyond the seas,) for seven years; and if they return or are seen at large in this kingdom within that time, it shall be felony without benefit of clergy. And by the subsequent statutes 6 Geo. 2. c. 15; and 8 Geo. 3. c. 15, many wise provisions are made for the more speedy and effectual execution of the laws relating to transportation, and the conviction of such as transgress them. But now by the stat. 19 Geo. 3. c. 74. all offenders liable to transportation may, in lieu thereof, at the discretion of the judges, be employed, if males (except in the case of petty larceny) in hard labour for the benefit of some public navigation, or whether males or females, may in all cases be confined to hard labour in certain penitentiary houses, to be erected by virtue of the said act, for the several terms therein specified, but in no case exceeding seven years, with a power of subsequent mitigation and even of reward, in case of their good behaviour; but if they escape and are retaken, for the first time, an addition of three years is made to the term of their confinement; and a second escape is felony without benefit of clergy. It was also enacted by the same statute 19 Geo. 3. c. 74. that instead of burning in the hand (which was too slight and sometimes too disgraceful a punishment), the Court, in all clergyable felonies, may impose a pecuniary fine; or (except in the cases of manslaughter,) may order the offender to be once or oftener, but not more than twice, either publicly or privately whipped; such private whipping (to prevent collusion or abuse) to be inflicted in the presence of two witnesses, and in case of female offenders in the presence of females only; (punishments are concerning females abolished by 1 Geo. 4. c. 57.) which fine or whipping shall have the same consequences as burning in the hand; and the offender so fined or whipped shall be equally liable to a subsequent detainer or imprisonment. And by stat. 6 Geo. 4. c. 25. s. 2. it is enacted, that where any offender hath been or shall be convicted of any felony within the benefit of any clergy, and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for such felony, the punishment so endured hath and shall have the like effect and consequences, to all intents and purposes whatsoever, as if he or she had been burned or marked according to the provisions of the stat. 4 H. 7. c. 13; 21 Jac. c. 16; 3 W. & M. c. 9; 4 & 5 W. & M. c. 24. 6 & 7 W. & M. c. 14.

By 25 Edw. 3. clerks, as well secular as religious, may claim the benefit of clergy.

[466] greSSION, yet persons actually in orders had, until the 6 Geo. 4. c. 25. s. 34. great preference over mere laymen, for they had a right to an immediate discharge without any imprisonment, corporal suffering, transportation, or disgrace; for these punishments were introduced instead of branding, from which they were at all times exempt. The new act provides that clerks in holy orders, being convicted of felony, shall stand and be under the same pains and dangers for the same, and shall be used and ordered, to all intents and purposes, as other persons not being in holy orders.

The most important alteration, however, in the law, as regards the benefit of clergy, is contained in the 4th section of the stat. 6 Geo. 4. c. 25. Before that statute, if a person was convicted and received judgment in a case of clergyable felony, and had the benefit of clergy, he was thereby discharged as to all felonies within the benefit of clergy which he had before committed; but not as to felonies without benefit of clergy. Indeed the case of William Jennings, Russ. and Ry. C. C. R. 388; went rather further. He was indicted for the murder of Mary Ann Condon, and tried before *Mr. Justice Park*, at the April Sessions, at the Old ailey, 1819, and convicted of manslaughter. He had been tried at the preceding February Sessions, and convicted of manslaughter in killing Mary Cormack, and received the benefit of clergy. The act which caused the deaths of both the deceased was the same, but Mary Ann Condon died after the prisoner had been allowed the benefit of clergy. *Park, J.* reserved the point, and the judges unanimously held that the allowance of the benefit of clergy in the first case protected the prisoner as to the second. Thus stood the law before the passing of the statute of 6 Geo. 4. c. 25; but now, by the 4th section of that statute, it is enacted, "that the allowance of the benefit of clergy to any person who shall, after the passing of this act (20th of May, 1825,) be convicted of any felony, shall not render the person to whom such benefit is allowed punishable for any other felony, by him or her committed before the time of such allowance." Therefore, now the allowance of benefit of clergy has no operation in a prisoner's favour, except as respects the individual charge on which it is allowed. This makes it expedient, if there are several charges against a prisoner, that the whole of them should be disposed of, either by his being tried on them, or by acquittals being taken, because the prosecutor declines to adduce evidence; for if the prisoner be only tried on one or two out of a number of indictments found against him he might be apprehended and tried on the others at any distance of time

[467] Benefit of clergy might have been claimed on an appeal, as well as an indictment* for any crime to which the punishment of death is attached at common law; but now Arson; Burglary,

(B) AS TO WHAT CRIMES IT IS DEMANDABLE.

Before the abolition of appeals (*ante*, vol. i. p. 721) the benefit of clergy was demandable as well upon an appeal as an indictment for any crime whatsoever, which subjects the offender to the loss of life; see 11 Coke, 29; Finch, 462; 2 Hawk. P. C. 479.

By the 9 Geo. 1. c. 22. it is enacted that if any person or persons shall set fire to any house, farm, or out-house, or to any hovel, cock-mow, or stack of corn, straw, hay, or wood, or shall by gift or promise of money, or other reward, procure another to join him or them in any unlawful act, such offender shall suffer death without benefit of clergy.

By the 18 Eliz. c. 7. the principle in every burglary is excluded from his

* It is laid down, that where any act since the 25 Ed. 3. st. 3. c. 4. takes away clergy on a case where the statute of Edward would have admitted it, it only applies to such parties as are expressly named in the act; see 2 Hale, P. C. 335; 2 Hawk. P. C. c. 33. s. 26. And, therefore, where clergy is taken away from the principal, it is not necessarily taken from the accessory, either before or after the fact, unless he be particularly included in the words of the statute; see 11 Co. 37; 2 Hale, P. C. 335; Bla. Com. 373. And with respect to clergyable felonies committed on the high seas, or out of the body of any county, it is enacted, that if any person be tried for any offence committed on the sea, within the jurisdiction of the Admiralty, or by virtue of any commission directed under the stat. of the 28 Hen. 8. and be found guilty of any offence, which, if committed on land, would be clergyable, such person shall be entitled to the benefit of clergy, and receive the same punishment for such offence as if he or she committed the offence in or upon the land; 1 Geo. 4. c. 90.

clergy; and by 3 & 4 W. & M. every person who shall counsel, hire, or com- **Forcible**
mand to commit any burglary shall not have his clergy. **marriage;**

Forcible marriage is an offence excluded from the benefit of clergy; see **Forgery;**
25 Hen. 8. c. 5; Eliz. c. 17. See vide 1 Geo. 4. c. 115.

Forgery is made felony without benefit of clergy by a variety of statutes. Thus clergy is taken away from the forging, altering, or uttering as true, when forged, any bank bills, notes, or other securities; see 2 East. P. C. 1003; 8 & 9 W. 3. c. 20. s. 35; 11 Geo. 1. c. 9; 12 Geo. 1. c. 32; 15 Geo. 2. c. 13; 13 Geo. 3. c. 79; army or navy debentures; see 5 Geo. 1. c. 11; 9 Geo. 1. c. 5.; the hand of the receiver of the port fines; 32 Geo. 2. c. 11; or of the receiver or accountant-general of the Court of Chancery; 12 Geo. 1. c. 32; South Sea; 9 Anne. c. 21; 5 Geo. 1. c. 4; 12 Geo. 1. c. 32; or East India bonds; see 12 Geo. 1. c. 32; writings under the seal of the London, or Royal Exchange Assurance; see 6 Geo. 1. c. 18. s. 13; letters of attorney, or other powers to receive a transfer, stock, or annuities, or personating a proprietor to transfer them or receive the dividends; see 8 Geo. 1. c. 22; 9 Geo. 1. c. 12; 31 Geo. 2. c. 22; stamps to defraud the revenue; see 10 Anne. c. 19; 37 Geo. 3. c. 90; 27 Geo. 3. c. 13; and Mediterranean passes, under the hands of the Lords of the Admiralty, to protect a voyager from the piracies of the Barbarian corsairs; see 4 Geo. 2. c. 18; it is also felony without benefit of clergy, to forge or counterfeit any stamp or mark to denote the standard of gold or silver plate, and to commit several other offences which have a similar effect and tendency; see 31 Geo. 2. c. 32; 14 Geo. 3. c. 52; 24 Geo. 3. c. 53; so also in the personating or procuring to be personated, any seaman or other person entitled to wages, or other naval emoluments, or any of his personal representatives; and the taking, or procuring to be taken, any false oath, in order to obtain a probate or letters of administration in order to procure such payments; and the forging, or procuring to be forged, and the uttering or publishing as true, any seaman's counterfeited, will or power of attorney; see 31 Geo. 2. c. 10; 9 Geo. 3. c. 30; the forging of any marriage licence or register is also marked with the same security; see 26 Geo. 2. c. 33; and by several more general provisions, almost every species of forgery, with intent to defraud, that can be imagined, whether in the name of a real or fictitious person, is made capital. By the 25 Geo. 2. c. 25. the forging any deed, will, testament, bond, bill of exchange, promissory note, for the payment of money or any indorsment thereon, or any receipt or acquittance either for money or goods, with intent to defraud another, and the uttering and publishing the same to be true; is made felony, and excluded from the benefit of the statute. It is an offence of the same degree to forge or utter as true, a counterfeit acceptance of a bill of exchange, or the number or principal sum of any note, bill, or other security for the payment of money, or any warrant or order for the payment of money, or the delivery of goods; see 7 Geo. 2. c. 22; 18 Geo. 3. c. 18.; and 1 Chit. Crim. 683. [468]

Horse stealing is a crime excluded from the benefit of clergy by the 1 Ed. 6. as to principals, and by the 31 Eliz. c. 12. s. 5. accessories before the fact, **Horse steal**
and after the fact, are placed in the same condition.* **ing;**

The principal offender attainted or convicted of *breaking any house* by day, **House-**
was deprived of the benefit of clergy by 1 Ed. 6. c. 12. s. 10. in all cases **breaking;**
except the challenging peremptorily more than 20 jurymen, which *casus omissus*
is provided for as in other cases, by the 3 & 4 W. c. 9. s. 2.

Willful murder of malice prepense is excluded from the benefit of clergy **Murder;**
by the 23 and 25 Hen. 8. and 1 Ed. 6. c. 12; and accessories before, to such
murder, are expressly excluded from clergy in all cases, as well upon appeals

* But this last provision has been holden to extend only to those who were regarded as accessories at the time the act was framed. and not to those who have been subsequently declared to the partakers in guilt, so that though persons knowingly receiving stolen property have been made accessories, yet this has no antecedent reference, and a party receiving a stolen horse is not ousted of clergy; see Post. 372; Com. Dig. 7. 11.

† Wherever a person is denied the benefit of clergy, in respect of a statute excluding it from the crime charged against him, the indictment must bring the case within the words

[469] as indictments by the 4 & 5 P. & M. And by the 1 Jac. 3. c. 8. any person that shall be convicted of homicide by stabbing, (except those who abet them,) shall be excluded from the benefit of his clergy.

Piracy; It is holden (11 Coke, 31.) by Sir Edward Coke, that piracy was restored to the benefit of clergy by this statute; but as to piracy on the high sea, the contrary hath been solemnly adjudged, Moor. 756, and confirmed by constant experience, and is certainly agreeable to the (2 Hale, P. C. 370.) legal notion of piracy in other cases; which being a capital offence by the civil law only (even after the statute of 28 Hen. 8. c. 15. which altered not the nature of the offence, but only the manner of the trial), shall not be included in a statute speaking generally of felonies which are such by law; as those piracies are which are committed in a creek or port within the body of a county, but no other.

Plundering vessels in navigable rivers, By the 24 Geo. 2. c. 45. it is enacted, that all and every person and persons, that shall feloniously steal any goods, wares, or merchandize, of the value of 40 shillings, in any ship, barge, lighter, boat, or other vessel or craft upon any navigable river, or in any port of entry, or discharge, or in any creek belonging to any navigable river, port of entry, or discharge within the kingdom of Great Britain, or shall feloniously steal any goods, wares, or merchandize of the value of 40 shillings, upon any wharf or key adjacent to any navigable river, port of entry, or discharge, or shall be present, aiding; and assisting in the committing any of the offences aforesaid, being therefore convicted and attainted; or being indicted thereof, shall of malice stand mute, or will not directly answer to the indictment, or shall peremptory challenge above the number of 20 persons returned to be of the jury, shall be excluded from the benefit of clergy. Capital punishment taken away by 4 Geo. 4. c. 53.

Plundering wrecks; As to stealing from vessels in distress, or plundering goods that have been saved from the wreck, the benefit of clergy is taken away by 12 Anne. s. 2. c. 18. and 26 Geo. 2. c. 19.

Rape; By the 18 Eliz. c. 7. all persons who commit rapes are excluded from the privilege of clergy.

Robbery in or near the highway;* By the 1 Ed. 6. c. 12. s. 10. it is enacted that all persons who shall be guilty of robbing any person or persons on the highway, or near to the highway, shall be excluded from the clergy.

[470] Robbery by breaking into a dwelling house, any person being therein, and put in fear, is excluded from clergy by the 1 Ed. 6. c. 22. s. 10. By the 4 & 5 P. & M. c. 4. accessaries before the fact to such a breaking, accompanied with larceny, are also excluded. Under this act, however, there still was a necessity, not only for some one to be in the house, but put in fear. But the 5 & 6 Ed. 6. c. 9. excludes from clergy the person who robs in a house, booth, or tent, the inhabitant, or any part of his family being there. whether they are waking or sleeping. And the 39 Eliz. c. 15. makes it felony without benefit of clergy, to take property to the value of 5*l.* in any dwelling house, although no person is within at the time the felony is committed. And the 9 & 10 W. & M. c. 9. s. 1. takes clergy from any person taking goods in a dwelling house, where any one is at the time, of whatever value; and if no one is there at the time, then if the property amounts to the value of 5*l.* as well from accessaries before the fact, as from those actually engaged in the felony.

of the statute. Therefore, if a murder be not expressly laid and proved to have been done of *malice prepense*, the offender shall have his clergy; see Dyer, 261; 23 Hen. 8. c. 1; 1 And. 195; 11 Coke, 37. But it has been adjudged, that an indictment against a man as accessory to murder before the fact, by the words *malitiose excidavit movit et preparavit*, &c. is sufficient to oust the offender of the benefit of clergy, by force of 4 & 5 P. & M. the words whereof are, "that all persons who shall maliciously command, hire, or counsel, any person, &c." which are not expressly pursued in such indictments. But the counselling another being necessarily in the moving, procuring, and exciting him, which, therefore, are tantamount in sense, and different only in the manner of expression, such an indictment is as much within the statute as if it followed the very words; see 1 Hawk. P. C. c. 32. s. 2.

* An indictment on that statute must lay the offence to be in or near the highway: see 2

By the 3 & 4 W. & M. c. 9. it is enacted, that all and every person or persons that shall rob any other person, or shall comfort and abet, assist, counsel, hire, or command any person or persons to commit such offence, being there- of convicted, or attainted, or being indicted, and standing mute, or challenging peremptorily above 20, shall not have the benefit of clergy. Robbery from the person;

As to sacrilege, it is observable, that all persons not in holy orders, who shall be indicted, whether in the county wherein the fact was committed, or in a different county, of "robbing any church, chapel, or other holy place," are excluded from their clergy, by 23 Hen. 8. c. 1., and 25 Hen. 8. c. 3., revived by 5 & 6 Edw. 6. c. 10. Upon a conviction, standing mute, or peremptory challenge of more than twenty; and 3 & 4 W. & M. c. 9. upon an outlawry. But the word robbing being always taken to carry with it some force, as shall be more fully shown, sections 88. 92. 96., it seems that no sacrilege is within any of these statutes, which is not accompanied with the actual breaking of a church, &c.; though by 1. Edw. 6. c. 12. s. 10. all persons in general are ousted of their clergy for the "felonious taking of any goods out of any parish church or chapel," in all cases, except that of challenging more than twenty; and 3 & 4 W. & M. c. 9. upon such a challenging, as well as upon a conviction, &c. upon an indictment, whether in the same county wherein the sacrilege was committed, or in a different one. And it seems, that accessaries to such robbery or felonious taking are excluded from their clergy by no statute; for though they are expressly mentioned by 23 Hen. 8. c. 1. yet, since that, are omitted by 25 Hen. 8. c. 3; and so much only of 23 Hen. 8. c. 1. is revived as is affirmed and enforced by 25 H. 8. c. 3; they seem to remain in the same case as if they had been wholly omitted by 23 Hen. 8. c. 1. which is the only statute which extends to them, except that offence amount to burglary; in which case accessaries before are ousted of their clergy by 3 & 4 W. & M. c. 9. Sacrilege;

By 25 Hen. 8. c. 6. and 5 Eliz. c. 17. unnatural offences are excluded from the benefit of clergy. Sodomy;

Taking away manufactures from bleaching grounds is a crime excluded from the benefit of clergy by the 18 Geo. 2. c. 27; *sed vide* 4 Geo. 4. c. 53. Stealing from bleach- ing grounds; [471]

By the 22 Car. 2. c. 5. s. 3. and 39 & 40 Geo. 3. c. 89. stealing cloth from the tenter in the night time, and embezzling naval stores to the value of 20s. are beyond the benefit of clergy. *Sed vide* 4 Geo. 4. c. 53. Stealing cloth from tenter;

By the 14 Geo. 2. c. 6. it is enacted, that if any person or persons shall kill or steal sheep, or other cattle,* they shall be adjudged guilty of felony without benefit of clergy. Stealing Sheep and other cat- tle;

By the 10 & 11 W. 3. c. 23. any person who, in any shop, warehouse, coach-house, or stable, steals goods, wares, or merchandizes, to the value of 40s. is not entitled to the benefit of clergy. *Sed, vide* 1 Geo. 4. c. 117; 4 Geo. 4. c. 53. Stealing from shops, outhouses, &c.†

Hawk. P. C. 495.

* The term, *other cattle*, has been construed to comprehend bulls, cows, oxen, steers, bullocks, heifers, calves, and lambs, and no other animals; see 15 Geo. 2. c. 24.

† But this does not extend to accessaries; see 2 Hawk. P. C. c. 38. s. 65. And to bring the prisoner within the act, the property stolen must be such as is usually exposed to sale in the shop, not any valuable thing accidentally put there, and the same equitable construction should take place in regard to warehouses. And though coach-houses and stables are not places for sale, yet the goods should be such as are usually lodged in places of that description. It has been holden; 1 Peer. Will, 267; 3 Peer. Will. 112; that money is not within the act, the words being, "goods, wares, and merchandizes," and the safer construction is to confine it to goods *ejusdem generis*, goods exposed to sale; Foster 78. Accordingly it has been doubted, whether the box coat or any part of the cloaths of a coachman be considered as any part of the proper furniture of a stable, as the bridles, saddles, horse-cloths, box-cloths, &c. certainly are; O. B. 1784. p. 433. cited 2 Hawk. P. C. 49. Goods also sent to warehouses by the waterside, in order to be shipped, are not within this act, for such warehouses are not places where merchants and other traders keep their goods for sale in the nature of shops, and where customers go to view them. And it has been ruled, that a watchmaker's shop, where the watch of another is left to be repaired, is in this respect a repository and not a shop, within this statute, because such watch was not there for sale; O. B. 1784. cited 2 Hawk. P. C. 491; so also

Treason;
are depriv-
ed of that
privilege by
particular
statutes.

Benefit of clergy seems never to have extended to high treason; see 2 Hale, P. C. 326; 2 Hawk. P. C. c. 33. s. 20; Staunf. P. C. 124; 11 Co. 29. b; 2 Inst. 150; 4 Plac. Com. 574. And it was doubted whether petit treason was not excluded from this privilege; 2 Hawk. P. C. c. 33. s. 21. But the contrary was enacted by the 25 Edw. 3. s. 3. c. 4. which allows the privilege of clergy in all treasons and felonies except those affecting his majesty.

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(C) AS TO WHEN IT IS TO BE DEMANDED.

The benefit of clergy might have been demanded, by the ancient common law, as soon as the prisoner was brought to the bar, before any indictment or other proceeding against him; see 2 Inst. 150; 2 Hale, P. C. 377; Hob. 288; for it is admitted, that formerly the clergy claimed, and were in a great measure indulged a privilege of being wholly free from secular jurisdiction for crimes punishable with loss of life or member; see Bract. c. 9; 3 Com. 62; 4 Com. 359. But after the statute of Westminster the first, which strictly enjoined the ordinaries not to suffer clerks who had been indicted by solemn inquests to be delivered without due purgation, the judges soon made it a settled rule (see 2 Inst. 164; Finch, 463) not to deliver any clerk to the ordinary, before he had been first indicted and arraigned, and his offence had been inquired of and found by an inquest of office; which was done, both to the end that if the prisoner were found guilty, he might absolutely forfeit his goods, (see 5 Coke, 110; Plowden, 262; Hob. 289;) which anciently were saved by a purgation) and also that the court might be apprised whether it were proper, from the circumstances of the case disclosed upon such an inquiry, to deliver the clerk to the ordinary generally, in which case he was allowed to make his purgation; see Hob. 288; 5 Coke, 109; or specially; see Rast. 121; Hob. 288; Kely, 100; 4 Comm. 352; *absque purgatione facienda*. But this practice being found inconvenient to prisoners, because they lost their goods if found guilty, by such inquiry, and yet could take no challenge to any of the jury, it being but an inquest of office; it became the general practice (see 2 Hale, P. C. 378; 2 Inst. 164; Finch, 463; Hob. 288: since the reign of Henry the sixth to oblige those who demand the benefit of clergy, to plead and put themselves upon their trial, under see H. 7. 3. K. B. 12) pain of being dealt with as those that stand mute, whereby they forfeit their goods without any inquiry concerning their crime; but yet (see 8 H. 3) cannot be denied their clergy, where they should be entitled to it, in case they were convicted, unless they be specially excluded by some statute. But after a clerk has put himself upon his trial, and the inquest are charged with him, it is said that he (see Finch, 463) may, if he desire it, be admitted to his clergy, before the jury come back; but shall not forfeit his goods unless they find him guilty. It is also generally agreed by modern writers (see 2 Hale, P. C. 378), that a person may demand his clergy after a *non legit* recorded; and also after judgment given against him, whether of death, or of outlawry, &c. as well as before judgment, and even under the gallows, if there be a judge there, has power to allow it; as a justice of the King's Bench, if the party were condemned there; or a justice of gaol delivery, if he were condemned before him, and the commission of gaol delivery be not the warehouse of a blackwell hall factor, who does not expose his goods to sale, till asked for, and who sells on commission, has been ruled not within the act; O. B. 1784 cited 2 Hawk. P. C. 491. But it is enacted by 12 Anne, c. 7. "that every person who shall feloniously steal any money, goods, or chattels, wares or merchandizes, of the value of 40s. or more, being in a dwelling house, or outhouse thereunto belonging, although such house or outhouse be not actually broken by such offender, although the owner of such goods, or any other person or persons be or be not in such house or outhouse, or shall assist or aid any person or persons to commit any such offence, being thereof convicted or attainted by verdict or confession, or being indicted thereof shall stand mute, or will not directly answer to the indictment, or shall peremptorily challenge above the number of 20 returned to be of the jury, shall be absolutely debarred of and from the benefit of clergy, &c." To oust an offender of his clergy for stealing to the amount of 40s. in a dwelling house, the larceny must be of things under the protection of the house, not of any person in it, and, therefore, not of money out of his pocket; Rex v. Owen, 2 Leach, C. L. 572; S. C. 2 East, P. C. 645. abridged *post*, tit, Larceny; nor of a bank note delivered to him to change; Rex v. Campbell, 2 Leach, C. L. 564; S. C. 2 East, P. C. 644; see 1 Geo. 4. 117; 4 Geo. 4. c. 53; Russ. and Ry. C. C. 343.

yet adjourned, and, according to some opinions, even though the commission were adjourned: see 10 Assize, 42; Dyer, 183; 34 H. 6. 49; 1 Hale, P. C. 380; 8 H. 42; 34 H. 6. 49.

(D) IN WHAT MANNER IT IS TO BE DEMANDED.

The usual mode of granting benefit of clergy is for the clerk to ask the prisoner what he has to say why judgment of death should not be pronounced upon him, and then to desire him to fall upon his knees and pray the benefit of the statute: which he does; and the Court grants it to him without delay; see 4 Bl. Com. 370. n. 2; see 2 Hale, P. C. 321; Com. Dig. Justices, 7. 16; Williams, J. Felony, V. When a peer prays his clergy, so as to be discharged without any further punishment, to which we have seen he is entitled, he specifically avers that he is a peer of the kingdom, having a place and voice in parliament, and prays the benefit of the 1 Edw. 6. c. 12; see 5 Harg. St. Tr. 180; 2 Hale, P. C. 396; which is granted him; and he is at the same time commonly reminded that he cannot have it upon a second conviction; *ibid.* The judgment entered on this occasion is, "and therefore it is considered that he be set at liberty, according to the form of the statute in such case made and provided." When it is prayed by a clerk in holy orders, that fact is alleged as entitling him to an immediate discharge, and an entry to that effect is made on the record; see 2 Hale, P. C. 396; 1 Chit. Crim. 686, 7.

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(E) WHO IS TO JUDGE WHETHER THE PERSON WHO DEMANDS IT HAS A RIGHT TO IT.

In all cases the temporal judge is to determine both whether the crime be within the benefit of clergy, and whether the person who demands it be qualified to demand it or not. For notwithstanding it had its original commencement in the canon law, yet it is not otherwise to be allowed here than as it has been received by, and is agreeable to, the common or statute law, whereof the temporal courts are the judges, and therefore all questions of this kind are to be determined by those courts; see 2 Hob. 288; Kelynge, 28; 9 E. 4. 28; F. N. B. 66; 34 H. 6. 49; 15 H. 7. 9; Finch, 463; 2 Hale, P. C. 378; 9 E. 4. 28.

(F) AS TO WHETHER IT SHALL BE ALLOWED WHERE IT IS NOT DEMANDED.

If the offence be within clergy, though, in strictness of law, the prisoner ought to pray it, yet it is the duty of the judge to allow it, though not prayed, and that as well prior as subsequent to judgment; see Bract c. 9; 2 Inst. 163; 9 E. 4. 28; 34 H. 6. 49; Kelynge, 99; Hob. 289; F. N. B. 26.

(G) CONSEQUENCES OF ITS BEING ALLOWED.

The consequences of the benefit of clergy being allowed, are, 1st. That by the conviction he forfeits all his goods to the king; which, being once vested in the crown, shall not afterwards be restored to the offender; see 2 Hale, P. C. 388. 2d. That, after conviction, and till he receives the judgment of the law, by branding, or some of its substitutes, or is pardoned by the king, he is to all intents and purposes a felon, and subject to all the disabilities and other incidents of a felon; see 3 P. Wms. 487. 3d. That after burning, or its substitute, or pardon, he was formerly discharged for ever of that and all other felonies before committed, within the benefit of clergy.* 4th. That by the burning, or its substitute, or the pardon of it, he is restored to all capacities and credits, and the possession of his lands, as if he never had been convicted; see 2 Hale P. C. 389; 5 Rep. 110; 6 Geo. 4. c. 25. s. 2. 5th. That what is said with regard to the advantages of commoners and laymen, subsequent to the burning in the hand, is equally applicable to all peers and clergymen, although never branded at all, or subjected to other punishments in its stead. For they have the same privileges, without any burning, or any substitute for it, which others are entitled to after it; see 2 Hale, P. C. 389; *sed vide* 6 Geo. 4. c. 25. s. 2. *infra*. It has been held, however, that a clergyman, convicted of manslaughter at common law, may be libelled against in the Spiritual Court, in

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* But now by the 6 Geo. 4. c. 25. it is enacted, that the allowance of the benefit of clergy to any person who shall, after the passing of this act, be convicted of felony, shall not render the person, to whom such benefit is allowed, punishable for any other felony, by him or her committed before the time of such allowance.

The benefit of clergy order to a deprivation, notwithstanding the allowance of clergy; see *Cro. Jac.* 438. And an attorney may be struck off the roll; see 1 *Chit. Crim.* 490; because in both these cases, the conviction renders the offenders unfit to exercise their respective professions.

(H) AS TO THE NUMBER OF TIMES IT WILL BE ALLOWED.

1. It is enacted by the 4 Hen. 7. c. 13. "that every person not being within orders, who hath once been admitted to the benefit of his clergy, afterwards arraigned of any such offence, be not admitted to have the benefit or privilege of the clergy, &c." And it is provided, "That if any person, at the second time of asking his clergy, because he is within orders, hath not there ready his letters of his orders, or a certificate of his ordinary, witnessing the same; that then the justices, afore whom he is so arraigned, shall give him a day, by their discretion, to bring in his said letters, or certificate; and if he fail, and bring not at such a day his said letters, or certificate, then the person to loose the benefit of his clergy, as he shall do that is without orders." And now, by the 6 Geo. 4. c. 25. it is provided that clerks in holy orders being convicted of felony, shall stand and be under the same pains and dangers for the same, and shall be used and ordered, to all intents and purposes, as other persons not being in holy orders; see 18 Hen. 8. a. 7.

2. *REX v. SCOTT.* Oct. Sess. 1785. Old Bailey. 1 Leach, C. L. 401.

Three prisoners were convicted on 11 Geo. 3. c. 40. for counterfeiting copper moneys of the realm called a farthing; and having been before convicted, and allowed benefit of clergy, for the same offence, it was prayed that judgment of death might be passed on them, pursuant to 4 H. 7. c. 13. For this purpose a counter-plea was filed, reciting the second of the former convictions, and averring the identity, &c. Replication, *nul tiel record*; and a jury returned *instantly* to try it. At the trial it was objected, that the counter-plea was insufficient, inasmuch as the tenor of the indictment ought to have been correctly stated; and even if it were not necessary to set forth the whole of the indictment, according to its tenor, yet that enough should be stated to show that the prisoner had been duly attainted of the former felony, which had not there been done, as no place was stated in the indictment, or set forth in the counter-plea, where the offence was committed, from whence the *venue* could appear. A case being reserved for the opinion of the judges, whether the counter-plea was in its present form sufficient to oust the prisoner of his clergy? The judges were of opinion that the objections to the indictment to which the counter-plea was pleaded were unavailable, since the defects in the original indictment were matters of error, not to be taken advantage of as this clergy, and counter-plea.

3. *REX v. DEAN.* Sept. Sess. 1787. Old Bailey. 1 Leach, C. L. 476.

A prisoner, on being convicted on the 8 & 9 W. 3. c. 26. being asked why judgment of death should not be passed upon him according to law, he prayed to be allowed the benefit of clergy. Against this plea the counsel for the prosecution filed a counter-plea, which alleged that he was not entitled to the benefit of the statute, because it had been before allowed him. The court gave the prisoner time until the next sessions to frame a replication; but in the mean time he died.

CLERGYMEN. See *tit. Ecclesiastical Persons; Simony.*

CLERK. See *tit. Ecclesiastical Persons.*

CLERK OF ARRAIGN.

MILWARD v. THATCHER. M. T. 1787. K. B. 2 T. R. 81. Abridged post.

The Court in this case, said, that although the names of the clerk of assize, and clerk of arraigns, are inserted in the commission of oyer and terminer, yet there never was any instance of their acting as judges, nor have they any authority to decide on any question.

* The duty of the clerk of the arraigns consists of three parts: 1st. In calling the prisoner to the bar by his name, and commanding to hold up his hand. 2d. Reading the indictment to him distinctly in English, that he may understand the charge. and lastly, demanding of him whether he is guilty or not, and asking him how he will be tried; see 2 Hale, P. C. 219; 4 Harg. St. 777.

Even by clerks in orders.

[475] Therefore *autrefois* convict may be pleaded by the king in a counter-plea, to prevent a prisoner who has been before convicted, and prayed his clergy, from being allowed it a second time; and such counter-plea need not set out the tenor of the indictment on which the prisoner has been allowed his clergy. And if a prisoner prays his clergy, and counter-plea the king files a counter-plea that he has had it before, the Court will give him time to reply. Although the names of the clerks of assize and arraigns are inserted in the commission, they cannot be deemed judges.*

CLERK OF ASSIZE.* See *tits. Clerk of Arraign; Estreat; Sheriff.* [476]

FLEETWOOD v. FINCH. M. T. 1793. C. P. 2 H. Bl. 220.

The 19 Geo. 3. c. 74. provides, that "the clerk of assize, or other clerk of the court, shall have the same fee, gratuity, or satisfaction, as hath usually been paid, and would have been due to them respectively, if such offender had been sentenced to transportation, except in the case of petty larceny, wherein they shall have only such fees as have usually and of right been paid upon conviction for the same offence; and such fees, gratuities, and satisfaction, &c. shall be paid by the treasurer of the county, &c. to such clerk of assize." The plaintiff being clerk of assize for the Norfolk circuit, and the defendant being treasurer for the same county, the former brought *assumpsit* to recover 171*l.*, being the amount of fees which the plaintiff claimed to have become due to him, as such clerk of assize, from 1779 to 1791, at the assizes for the county of Norfolk, for persons convicted of transportable offences, and sentenced to transportation, hard labour, or confinement in the house of correction; and for persons capitally convicted, who afterwards have received the king's pardon on condition of being transported or imprisoned, being after the rate of one guinea for every such person. That the clerks of assize in the different circuits have been accustomed to receive some certain fee for every person so convicted, and the usual fee which has been paid in the county of Norfolk has been one guinea. That the defendant, as treasurer, has in his hands more than sufficient to pay, &c. *Per Cur.* No fee is payable to officers unless by custom or statute. This fee is claimed under the 19 Geo. 3. c. 74. The 16 Geo. 3. c. 43. enacts, that the clerk of assize shall give a certificate in the cases mentioned in the act, and have like satisfaction as hath been usually paid for the order of transportation. The 19 Geo. 3. c. 74. by varying the phrase, and adding the words, *would have been due*, has let in the argument showing that nothing was due: but we cannot suffer that construction to prevail, since we think that the legislature meant, that the clerk of assize should have the same fee as had been usually paid since the establishment of transportations; it being highly reasonable that a public officer should have some recompence.—Judgment for plaintiff.

2. REX v. BURY. E. T. 1779. K. B. 1 Leach, C. L. 201.

A clerk of assize having refused to obey a *certiorari* to remove an indictment for murder, a rule was obtained to show cause why an attachment should not issue against him. On showing cause, it was insisted that he had a right to retain the record till he should be paid his fees.

But Lord Mansfield said, he should be very sorry to determine that a clerk of assize had a lien on the records of the court for his fees, for that he foresaw great inconvenience from such a doctrine; it was therefore referred to the master to report what was due.—Rule discharged.

CLERK OF ATTORNIES. See *tit. Attorney.*

CLERK IN CHANCERY

GOLDSMITH v. BAYNARD. E. T. 1764. C. P. 2 Wils. 228.

In *assumpsit*, the defendant pleaded his privilege as a 60th clerk in Chancery: replication that the defendant was discharged out of prison under the insolvent debtor's act, and assigned his office to the clerk of the peace: after argument, demurrer, and joinder in demurrer.

Per Cur. This sort of plea is to be discouraged; we see the defendant is not in actual service, and attendant upon the Court of Chancery. The replication alleges, that the defendant put this office in his schedule, and has assigned it: this is confessed by the demurrer, and therefore the defendant is concluded from saying, he has not assigned it. This plea is merely dilatory, and we

* The clerk of assize writes all judicial proceedings done by the justices of assizes on the circuits; see *Cromp. Jurisd.* 227; and he is interdicted from acting as counsel; see 38 Hen. 8. c. 24. As to his fees for drawing indictments, see 10 & 11 W. 3. c. 23. s. 7. And fines for falsely recording appearances of persons returned on a jury; see 8 Geo. 2. c. 25. s. 3.

+ See 3 Geo. 4. c. 69.

The fee due to the clerk of the assize is under the 19 Geo 3. c. 74. for every prisoner convicted of a transportable offence, is one guinea.

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A clerk of assize has no lien on the records for his fees.

To *assumpsit*, plea of privilege as a 60th clerk in Chancery; replication, that the defendant was discharged out of prison by the insolvent act, and assigned his office to the clerk of the peace. On demurrer, the Court held the defendant not privileged.

look nicely into such pleas; the defendant ought to have alleged, that he is actually attendant on the office; for attendance is the ground and foundation of the privilege, that they may not be drawn into other courts. The plea is therefore bad — Judgment that the defendant answer over.*

as he was
not in actu
al practice,

CLERK IN COURT.

The clerks in court are assistants to and appointed by the clerks of the crown.

CLERK OF THE CROWN.

[478] The clerk of the crown is an officer in the K. B., whose duty it is to frame, read, and record all indictments against offenders there arraigned and indicted for a crime, and when divers persons are arraigned, he is only entitled to one fee of 2s. for them all; 2 Hen. 4. c. 10. He is usually styled master of the crown office; and in pleadings, and other law proceedings, designated "Coroner and ally of our lord the king." He holds his office by virtue of letters patent under the great seal for life.

Clerk of the Commitments and Satisfactions.

This officer is appointed by the prothonotary, and holds his place for life; his duty is to enter the commitments and satisfactions.

Clerk of the Common Bails. See post, tit. Common Bail.

The clerk of the common bails is appointed by the prothonotary for life, whose duty it is to enter the common bails taken in the Court of King's Bench.

CLERK OF AFFIDAVITS.

The clerk of affidavits is an officer in the Court of Chancery, who files all affidavits made use of in court.

CLERK OF THE DAY RULES. See post, tit. Rules.

The clerk of the day rules in the King's Bench prison is appointed for life.

CLERK OF THE DECLARATIONS. See post, tit. Declarations.

The clerk of the declarations is an officer of the K. B., who files all declarations in causes there depending, after they are engrossed, &c. He is appointed by the prothonotary, and holds his office for life.

CLERK OF THE DOCKETS. See post, tit. Judgment.

The clerk of the dockets is nominated by the prothonotary, and holds his office for life.

CLERK OF THE ERRORS.† See post, tit. Error, Writ of.

ANON. M. T. 1704. K. B. 6 Mod. Rep. 245; S. C. 11 Mod. 33; S. C. 2 Ld. Raym. 1082; S. C. 1 Salk 652.

An action
lies against
the clerk of wrong,
an action on the case
will lie against him for it;
and if he make no re-
turn, the plaintiff may have a writ of *executio-
ne judicii* out of Chancery.
for negli-
gence.

Per Cur. Upon a writ of error, if the clerk below will certify the record the clerk of wrong, an action on the case will lie against him for it; and if he make no re- turn, the plaintiff may have a writ of *executio-
ne judicii* out of Chancery.

CLERK OF THE ESSOIGNS.

[480] This is an officer belonging to the C. P., whose duty it is to keep the es- soign rolls.

* Some of the Court doubted whether the above office was assignable. and thought it could only be surrendered to the Master of the Rolls, who is bound to receive such sur- render; they therefore gave no absolute opinion whether the replication was good or bad; see 5 Geo. 4. c. 61. s. 22. Clerks in Chancery are exempt from arrest; Order of Ch. 22d Dec. 1629; 3 Keb. 352; S. C. 2 Vent. 164; Petersdorff on Bail, 66.

† The clerk of the errors transcribes and certifies the tenor of the records of the cause or action upon which the writ of error is brought. He is appointed by the Lord Chief Jus- tice; and by Reg. Gen. T. T. 20 Car. 1. if the clerk of the errors does not receive the writs of error, and do those things which appertain thereto, the clerk of the treasury shall do his duty.

CLERK OF THE ESTREATS.

The clerk of the estreats is appointed by the prothonotary for life, belonging to the Exchequer, who every term receives the estreats out of the lord treasurer's remembrancer's office, and writes them out to be levied for the king.

CLERK OF THE GRAND JURIES.

This clerk is nominated by the clerks of the crown.

CLERK OF THE HANAPER.

The clerk of the hanaper is an officer of the Court of Chancery, whose duty it is to receive the money due to the king for the sealing of charters, patents, commissions, and writs, and also the fees due to the officers for enrolling and examining the same.

CLERK OF THE INROLMENTS.

This clerk is an officer of the C. P., who examines and inrols all fines and recoveries, and returns writs of entry (summons) and jurors, &c.

CLERK OF THE JUDGMENTS.

The clerks of the judgments is appointed for life by the prothonotary.

CLERK OF THE JURIES.

The clerk of the juries is an officer belonging to the C. P., who makes out the writs of *habeas corpus* and *distringas*, for the appearance of juries, either in that court, or at the assizes, after jury or panel is returned upon the *venire facias*. He also enters into the rolls the awarding of these writs, and makes all the continuances from the issuing of the *habeas corpus* until the verdict is given; see 6 Geo. 4. c. 56.

CLERK OF THE MARKET. See *post*, tit. *Weights and Measures*.

BURDETT'S CASE. T. T. 1708. K. B. 1 Salk. 327.

In an action of trespass, the defendant justified as clerk of the market within the district of Whitechapel, for a distress of 3s. 4d. for not using measures marked according to the standard of the Exchequer. On demurrer, it was urged for the defendant, that this was an authority given by stat. 14 E. 3. c. 12. s. 2.

Holt, C. J. held, that the clerk of the market could not have power to estreat fines and amerciaments, otherwise than as a franchise; and it is more reasonable the clerk should bring the standard with him, than that the people should follow him, or attend at a place out of the market.

CLERK MARSHAL OF THE KING'S BENCH.

The clerk marshal of the King's Bench is an officer that attends the marshal in his court, and records all his proceedings.

CLERK OF THE NIHILS.

* The clerk of the market is an officer of the king's house, to whom it belongs to take charge of the king's measures, and keep the standards of them, which are examples of all measures throughout the land; as of ells, yards, quarts, gallons, &c. and of weights, bushels, &c. And to see that all weights and measures, in every place, be answerable to the said standard; see Fleta, lib. 2. c. 8. 9. 10; and stats. 13 R. 2. c. 4. and 16 R. 2. c. 8; see 5 Geo. 4. c. 74. s. 19. The stat. 16 Car. 1. c. 19. enacts that clerks of the market of the king's or prince's household shall only execute their offices within their verge; and head officers are to act in corporations, &c. The clerks of markets have generally a power to hold a court, to which end they may issue out process to sheriffs and bailiffs to bring a jury before them; and give a charge, take presentments of such as keep or use false weights or measures, and may set a fine upon the offender, &c.; 4 Inst 274. The court of the clerk of the market is incident to every fair and market in the kingdom, to punish misdemeanors therein. It is the most inferior court of criminal jurisdiction in the kingdom; 4 Bl. Com. 275.

† So it is doubtful whether the clerk of the market can break pots not being measure: it has been said that he could not, but must order them to be broken, according to the form of the statute; Savil. 57. pl. 22. At the motion of Coke, attorney of the queen, all the justices of England assembled at Serjeant's-Inn, upon extortions committed by the clerks of the markets, because they had taken 1d. fee for the view of vessels, though they found not any defect in them, and had not sealed them, And all the justices agreed that this was grand extortion, and that no prescription can serve for taking a fee for the view only, unless they found default or sealed them; Mo. 528. pl. b. 90. Mich.; 39 & 40 Eliz. Anon.

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Whether
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This clerk is an officer in the Exchequer, who makes a roll of all such sums as are *nikild* by the sheriffs, upon their estreats, of green wax, and delivers the same into the remembrancer's office, to have execution done upon it for the king; see 5 Rich. 2. c. 13.

CLERK OF NISI PRIUS.

This officer is appointed by the *custos brevirum* for all counties except Westminster and the city of London; and for the latter places he is nominated by the chief justice.

CLERK OF OUTLAWRIES.

[481] The clerk of the outlawries is an officer belonging to the C. P., being the servant or deputy to the king's attorney-general, for making out writs of *capias adlagatum* after outlawry.

CLERK OF THE PAPER OFFICE.

The clerk of the paper office is an officer in the K. B. who makes up the paper books of the special pleadings and demurrers in that court.

CLERK OF THE PAPERS.

The clerk of the papers is an officer in the C. P., who has the custody of the papers of the warden of the Fleet; enters commitments and discharges of prisoners, delivers out-day-rules, &c.

CLERK OF THE PARISH See tit. *Parish Clerk*.

CLERK OF THE PATENTS.

The clerk of the patents is an officer appointed by the great seal, pursuant to the 18 Jac. 1.

CLERK OF THE PEACE. See tits. *Evidence; Justice of the Peace; Office*.

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III. RIGHTS OF.

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I. OF THE CHOICE AND SWEARING OF.*

[482] The *custos rotulorum* shall appoint an able and sufficient person, residing in the county or division, to execute the office of the clerk of the peace, by himself or his sufficient deputy (to be allowed of by the said *custos rotulorum*; 37 H. 8. c. 1) and to take and receive the fees, profits, and perquisites thereof, for so long a time only as such clerk of the peace shall well demean himself in his said office; 1 W. c. 21. s. 5.

2. SAUNDERS v. OWEN. E. T. 1700. K. B. 2 Salk. 467.

And the appointment is good tho' it be made without deed. On a writ of *assizes of notvel disseisin* for the office of clerk of the peace of Kent, the recognizers found a special verdict, viz. that the Earl of W. being *custos rotulorum* of that county, made F. O. clerk of the peace, to hold at his pleasure, by writing under his hand and seal; and because the justices of peace at their sessions scrupled to admit him upon this paper, the Lord W. came into court, and said, I nominate F. O. to be clerk of the peace, according to act of parliament. And the Court held, that it always belonged to the *custos rotulorum* to nominate the clerk of the peace, but the clerk of the peace was removable whenever the *custos* was removed or changed; and moreover was removable at the will of the *custos* till st. 32 H. 8 which makes him hold his office as long as the *custos* shall continue in power. Now by the late act, he is to continue for life; and though the words be "give and grant to him," yet it is only an appointment, and consequently may be without deed; that it cannot be a grant from the *custos*; or enure as such, is plain, because the *custos* is only at will; and he that has office at will, cannot make a grant for life, because there is no original estate sufficient to support it; therefore

* By 1 W. & M. c. 21. the clerk of the peace is to take the oaths of allegiance, supremacy, and abjuration, and to perform such requisites as other persons who qualify for offices, and swear that he has not, directly or indirectly, given money for the appointment

this must enure as an appointment, or the execution of a power given by the statute; like a power to an executor to sell, or a tenant for life to make leases; the consequence of all which is, that this was a good appointment, though without deed; for whatever is to take effect out of a power or authority, or by way of appointment, is good without deed; otherwise, where it takes an effect out of an interest, and is to enure as a grant; for then, if it be a thing incorporeal, it must be by deed. See 3 Mod. 150; Nay. 147; Carth. 426.

II. DUTIES OF.

By the 34 & 35 Hen. 8. c. 14. the clerk of the peace shall certify into the King's Bench the names of such as be outlawed, attainted, or convicted of felony.

By 22 & 23 Car. 2. c. 22. he shall deliver to the sheriff within 20 days after 29th September, yearly, a perfect es reat or schedule of all fines and other forfeitures in sessions.

And by the 22 & 23 Car. c. 22. the clerk of the peace shall yearly, on or before the second Monday after the morrow of All souls, deliver into the Court of Exchequer a perfect duplicate. certificate, of estreats of fines, &c., on pain of forfeiting 50*l.* half to the king, and half to him that shall sue.

It is the duty of the clerk of the peace* to certify out lawries; Deliver es treats to the sheriff; And into the Exchequer.

III. RIGHTS OF.

1*st.* As to fees.†

1. The 57 Geo. 3. c. 91. after reciting that doubts have arisen touching the fees and allowances due and to be made to the clerks of the peace of the several counties and other divisions in England and Wales, enacts, that the justices of the peace for Kent and Lancaster at their annual general sessions, and the justices of the peace for Kent and Lancaster at their annual general sessions, and the justices of the peace in every other county, riding, division, city town, liberty or precinct, within England and Wales, at their respective general quarter sessions of the peace, are empowered to ascertain, make, and settle a table of fees and allowances to be taken by the clerk of the peace, which shall be subject to the approbation of the justices of the peace at the then general annual session and general quarter session, or at some adjournment thereof; and such table of fees, when so approved, shall be laid before the judges of the assize at the next assizes for such counties and places respectively, except the several places being counties, in which assizes are not constantly or regularly holden in every year, and in those cases before the justices at the next assizes for the adjoining county, where assizes are constantly and regularly holden, and to which prisoners are generally removed for trial from such places respectively, and also except the counties in Wales, and the county palatine of Chester, and before the justices at the next great sessions for the several counties in Wales. and for the county palatine of Chester; and the said judges and justices respectively are hereby authorised to ratify and confirm such tables respectively either as settled and approved as aforesaid, or with such alterations, additions, and improvements, as to them shall appear to be just and reasonable; and the justices in sessions are also empowered from time to time to make other table of fees and allowances, to be approved. and afterwards ratified and confirmed in like manner.

By section 3. every such table of fees and allowances shall be deposited with the clerk of the peace, and an exact written or printed copy shall be pla-

* To issue processes, to record the proceedings of the sessions, and fulfil various duties, enjoined by different statutes, which are noticed under the titles to which they respectively relate.

† The clerk of the peace is not bound to enter judgment or the like at the suit of any person, without having the fee due for the same; but if the Court order any thing not at the suit of another, as *ex officio*, there he ought to enter the same without having any fee; see Crompt. 159.

‡ Previous to this statute the fees of this officer were dissimilar in different counties, and were regulated by custom and usage; except where by modern statutes specific remunerations were limited for a few particular dues.

By the 57 Geo. 3.† the clerk of the peace has a right to receive fees as settled by the sessions;

Which table of fees is to be hung up in some conspicuous part of

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the sessions house. And if he take great fees, he is liable to a penalty; To be sued for within three months.

ced and constantly kept in a conspicuous part of every room or place wherein any general or quarter sessions of the peace for such county or place shall be held, and if any clerk of the peace, or person acting as such, shall neglect to cause every such copy to be so placed and constantly kept, he shall forfeit to any person who shall sue for the same, the sum of 5*l*

By sect. 2. any clerk of the peace, or any person acting as such, demanding or receiving any other or greater fee or allowance than that which shall be so settled and confirmed, shall forfeit the sum of 5*l*. to any person who shall sue for the same in any of his majesty's courts of record at Westminster.

And by section 4. all actions shall be brought before the end of three calendar months after the offence committed. See 55 Geo. 3. c. 50.

2. *REX. v. WILLIAMS.* M. T. 1819. K. B. 3 B. & A. 215.

And where an order of sessions allowing in the treasurer's accounts an item "to the clerk of the peace his fees on rolls issued at one penny in the pound;" which was founded on a previous order of sessions creating such rate of allowance to the clerk of the peace, in lieu of fees heretofore taken, &c., the order was quashed.

By an order the treasurer's accounts for the county of L. were allowed at the annual general sessions by the magistrates there assembled. That order was afterwards brought up into this court by *certiorari*, and a motion made to quash such part of the order as allowed the sum of £140. 5*s*. 8*d*. to the treasurer, for the clerk of the peace's fees on rolls issued at one penny in the pound. The motion was supported by an affidavit that the allowance was made not upon any calculation of the work done by the clerk of the peace, but by a poundage upon the sums levied under the rate. In answer to this, an order of sessions was produced as follows; "That the clerk of the peace be allowed one penny in the pound on all sums raised by virtue of the said new assessment, in lieu of his usual fees heretofore taken for making the rates, and for the rolls, exclusive of all charges and expenses in printing and preparing the said rolls, which he is hereby directed to charge in his annual accounts." The Court quashed such part of the order of sessions, observing, it seems to be quite clear that the present order cannot be supported. *Prima facie* the allowance to the clerk of the peace is objectionable; for this is not the proper way of remunerating an officer, being according to the *quantum* of the rates collected, but not according to his trouble. Then that being so, it was incumbent on the treasury to show some order of sessions authorising the insertion of the above item in his accounts. Now the only order produced is not, in our opinion, supportable; the sessions having no jurisdiction to make a prospective order of this sort; for an allowance to the clerk of the peace by way of poundage. And consequently, if that order was made by a tribunal which had no such jurisdiction, the item in the treasurer's accounts ought to have been disallowed. Order of sessions quashed accordingly. See 1 B. & A. 312; 4 T. R. 591.

2*d*. *As to costs.*

REX v. SHARPNESS. T. T. 1787. K. B. 2. T. R. 47. Abridged, *post*.

The Court in this case held that the clerk of the peace, whose duty it is to draw up all the presentments in the form of indictment, is a public prosecutor within the meaning of the 5 & 6 W. & M. c. 11. s. 3.

IV. LIABILITIES OF.

1. *REX v. MAY.* E. T. 1779. K. B. 1 Leach. C. J. 201. note.

[485] If a clerk of the peace draw an indictment with unnecessary prolixity he may be ordered to pay the extraordinary expense.*

The Court referred an indictment for perjury against May, which had been removed from Hick's Hall, to the master, to see what part of the record was unnecessary, and made an order that the clerk of the peace should pay the expense incurred by such unnecessary part.

2. *ANON.* E. T. 1821 K. B. Cited 2 Dick. J. 362.

A criminal information was moved for against a clerk of the peace, for that he, being also a clerk of indictments, refused to draw an indictment, in pursuance of instructions delivered, and a tender of the usual fees.

Per Cur. Unless some corrupt motive be alleged, the Court of B. R. has

But he is not liable to a criminal information for refusing to draw indictments.

* And if he shall spare, take off, discharge, or conceal any fine or forfeiture, unless it be by rule of court, he shall forfeit treble value, half to the king, and half to him that shall sue; and shall also lose his office, and be for ever incapable to be employed in any office where the revenue is concerned. And moreover he may be amerced for not returning his estreats by the barons of the Exchequer; see 3 Geo. 1. c. 15.

no authority to interfere in a summary way. Neglect of duty may be a good ground for indictment, but not for special interference. Besides cases may frequently occur why a clerk of the peace may justifiably refuse to draw an indictment, in consequence of the difficulties of the case, and incompetency cannot be a ground for an information.

V. DISABILITIES OF.

By 22 Geo. 2. c. 46. s. 14. no clerk of the peace, or his deputy, shall act as solicitor attorney, or agent, or sue out any process at any general or quarter sessions, where he shall execute the office of clerk of the peace or deputy, on pain of 50*l.* to him who shall sue for the same within twelve months, with treble costs.

A clerk of the peace is disabled from acting as an attorney.

VI. OF DISPLACING OR REMOVING OF.

1. By 1 W. c. 21. if any clerk of the peace shall misdemean himself in the execution of his office, and thereupon a complaint, and charge in writing of such misdemeanor, shall be exhibited against him to the justices in session, the said justices may, on examination and due proof thereof, openly, in the said session, suspend or discharge him from the said office; and in such case the *custos rotulorum* shall appoint another able and sufficient person, residing in the said county or division, to be clerk of the peace. And in case of refusal or neglect to make such appointment, before the next general quarter session, the justices in session may appoint one.

The clerk of the peace may be displaced for misbehaviour.

2. *REX v. EVANS.* E. T. 1687. K. B. 4 Mod. 31; S. C. 1 Show. 282; [486*l*] *semb. contra.* 12 Mod. 13.

On a *mandamus* to restore E. to the office of clerk of the peace, a misbehaviour was returned, to wit, that a demand having been made of the rolls, he did not deliver them to the *custos rotulorum*; on which a peremptory *mandamus* was moved for, but denied by three justices, against Holt. C. J.

As for refusing to deliver the rolls &c. to the *custos rotulorum*;

3. *REGINA v. BAINES.* E. T. 1705. K. B. 2 Ld. Raym. 1265. S. C. 6 Mod. 192; Holt. 514.

An order, citing that by a complaint in writing, the clerk of the peace was charged with divers misdemeanors in the execution of his office, to wit, that he exacted from a prisoner 8*s.* 6*d.* for a subpoena to summon four witnesses to give evidence for him at the sessions, which contained only twelve lines; and that he, at the general quarter sessions held for the county, exacted from a poor labourer, and compelled him to pay, 9*s.* more for his just fees; and also that he had committed divers other exactions and extortions, particularly mentioned in the said charge; was holden bad, inasmuch as it did not accuse him of any misdemeanors in the execution of his office; because that part of the order which precedes the *videlicet* is not to be considered as part of the charge.

4. *HARCOURT v. FOX.* T. T. 1689. K. B. 12 Mod. 42; S. C. 1 Show. 426; S. C. 4 Mod. 167; S. C. Comb. 209; 1 Ld. Raym. 161; S. C. 11 Mod. 80.

On a special verdict, the question was, whether the plaintiff, being nominated clerk of the peace by J. C., had a good title to hold that office during life, or whether it was dependant on the *custos rotulorum*, and determined by his removal. *Per Cur.* By stat 1 W. & M. the *custos* has power to appoint a person to execute this office by himself or deputy, for so long time only as he shall demean himself well, &c. which does plainly import an estate for life; and the clause would have the same effect if the word only had been left out; for if the power is given to a tenant for life to make a lease for 21 years only, this would signify for so many years absolutely. If this clause has not a construction to give him an estate for life, it signifies nothing; for if the cause is taken to be no otherwise than as it stood in stat. 37 H. 8. then this clause is of no use; but it is plain that the words in that act relating to this matter are omitted in this new law, viz. that he shall continue so long as the other is *custos*; and a better and more fixed estate is given, viz. Stat. 1 W. & M. revives that of H. 8. as to the nomination of a *custos*, but makes several alterations from it when it mentions the clerk of the peace, as has been well observed at the bar;

But he is not removable by a succeeding *custos rotulorum* since he has a freehold in his office.

[487] so that the design of the later act was to abridge the power of the *custos*, and enlarge the estate of the clerk, and to settle him therein; that he might go on cheerfully in his business, for when places depend on contingencies, it occasions embezzling records, and neglect in offices; and for this reason Lord Hobart was of opinion that the C. J. cannot grant those offices which are in his gift for less time than for life. Therefore the clerk of the peace being in this office by virtue of this act, for so long time as he shall demean himself well; those words shall be construed most favourably to answer the intent of the law makers, whose design was to have the office well supplied by a man able and well skilled in the laws, which will be effected when the officer has an estate for life—Judgement was for the plaintiff, and afterwards affirmed in parliament

Therefore if he be appointed as directed by the 1 W. & M. the Court, on his being displaced, will grant a *mandamus* to restore him.

5. *REX v. OWEN*. T. T. 1690. K. B. 4 Mod. 293; S. C. 5 Mod. 314; S. C. Camb. 399; S. C. 1 Sid. 669; S. C. Holt, 190.

By the statute of 1 Will. & Mary, c. 21. the *custos rotulorum* is to appoint and nominate the clerk of the peace when the place is void, who has power by the act to execute it by himself or deputy "for so long time only as he shall demean himself well, &c." A *mandamus* was brought by Mr. Owen, directed to the justices of the peace of Kent, to restore him to the office of clerk of the peace of that county; and upon the return it appeared that the earl of Winchelsea, who was *custos rotulorum* in the first year of Will. & Mary, appointed Mr. Owen to be clerk of the peace *durante bene placito*, &c.; then the act of 1 Will. & Mary c. 21. was returned: and that the said earl was dead; and that afterwards the king constituted the lord Sidney to be *custos*, who appointed Mr. Saunders to be clerk of the peace, pursuant to the aforesaid act, who thereupon took upon himself the said office, and displaced Mr. Owen, who by this writ desired to be restored. Judgment was given in Hilary term that no peremptory *mandamus* should go; for by the act of 1 Wm. & Mary. c. 21. the *custos* is to nominate a clerk of the peace to execute that office for "so long as he shall well demean himself, &c." and if he appoint him in any other manner, he is no clerk of the peace; therefore the defendant being appointed by the earl of Winchelsea "during pleasure," it is not pursuant to the act, for he has not executed the authority given him by the act, and the defendant therefore can have no title.

6. *REX v. LLOYD*. M. T. 1734. K. B. 2 Stra. 996. S. P. *THE QUEEN v. THE CLERK OF THE PEACE OF CUMBERLAND*. 11 Mod. 802.

An order of sessions removing a clerk of the peace, need not set out the evidence.

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A complaint in writing was exhibited to the quarter sessions of Cardigan against Thomas Lloyd, clerk of the peace for that county, containing several charges of misbehaviour, which, if true; were a sufficient cause to remove him from that office. The sessions received the complaint, and ordered Lloyd a copy, and time to make his defence. And on the day appointed, reciting the complaint and notice, "upon due examination thereof openly, this day in court, and of the several matters and charges therein contained, and herein before partly specified, alleged, and charged, against the said Thomas Lloyd; and upon full hearing and examination of several witnesses, and other due proofs touching the several charges against the said Thomas Lloyd in the said articles contained, openly, this day in court, in the presence and hearing of the said Thomas Lloyd, and of his counsel, who now attend in this court on his behalf, and make a defence for him, and upon hearing what is alleged and insisted upon by the said Thomas Lloyd, and his counsel in his defence, this Court adjudges him guilty of the several articles, and remove him from his office, pursuant to the statute." A *certiorari* was brought to remove this order into B. R.; for the defendant it was objected, that this being a conviction in a summary way before justices of the peace, and without a jury, and the statute 1 W. & M. c. 21. requiring the removal to be upon due proof of the misdemeanour complained of; the evidence in this case ought to be set out, that the King's Bench may see whether there was due proof; and not trust the justices, who have deprived the defendant of his freehold upon less evidence than they ought to have done, or perhaps upon that which is no evidence in

point of law. *Per Cur.* It is fully settled, that in convictions the evidence must be set out; and if this was to be considered as a conviction, it therefore would be bad. But we are all of opinion it is to be considered as an order. In the three cases which have been decided upon the act, the *certiorari's* were to remove them as orders, and they are in English, which could not be if they were convictions. Baines' case (2 Ld Raym. 1199) was before all the judges, and they treated it as an order. And though it is said, here is a punishment that follows, viz. the loss of the office yet the same may be said of most of the acts of justices, where very severe penalties often follow. The cases of orders of bastardy are very strong, which are grounded on much the same words in 1 Eliz. c. 3. as are in 1 W. & M. c. 21. And as to the cases of setting out evidence on demurrers, it is absolutely necessary to have it on record; and the superior court are judges of the fact, as well as the law; which, on a *certiorari*, we are not. This exception was taken in Horwell's case; but the defendant died before any thing was done upon it. And as to Baines' case, it is a strong negative authority, for that was greatly canvassed at the bar and bench, and yet this exception not taken. At first we thought this a strong objection; but are convinced there is this distinction between orders and convictions, and the precedents are not to be shaken. This, therefore being an order, must be confirmed.

7. *REX V. BAINES.* E. T. 1705. K. B. 2 Ld. Raym. 1265; S. C. 2 Salk. 680; S. C. 6 Mod. 193. But such an order must show that a charge was exhibited sufficient to warrant his removal.

Per Holt, C. J., and Powell, J. An order, containing a charge against the defendant, to bring him under a forfeiture of his office, in which by the 1 W. & M. he has a freehold, ought to be as direct and certain as an indictment, by stating that a charge was exhibited against him sufficient to authorize his removal.

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Clerk of the Pells.

The clerk of the pells is an officer belonging to the exchequer, whose duty it is to enter every peller's bill into a parchment roll, or skin, called *pellis receptorum*; and also to make another role of payments, which is termed *pellis exituum*; wherein he sets down under what warrant the money was paid; see 22 & 23 Car. 2. c. 22.

CLERK OF THE RULES.

The clerk of the rules is an officer in the K. B., who draws up and enters all the rules and orders made in court, and gives the common rules or rules of course; see 22 & 23 Car. 2. c. 22.

Clerk of the Rules on the Crown Side.

This officer, on the crown side of the court, is appointed by the clerk of the Crown Office.

CLERK OF A TOWN

THE KING V. SEYMOUR RICHMOND. M. T. 1722. K. B. 8 Mod. 96.

An attachment *ni si* was obtained against the defendant, town clerk of W., for having attached meal in the market there, and sold the same under colour of the said attachment, when the owner would have given an appearance to the suit for which his goods were thus taken; and on complaint made by the owner to the mayor and burgesses there, he, the said defendant, was ordered to deliver the meal to the owner, on giving an appearance as aforesaid; but the defendant refused to deliver the meal, and said, that the owner should never have his meal again.

And on showing cause why an attachment should not go against him, he made an affidavit that he was town clerk of that borough, and that, when he made out the order to attach the meal, he thought it a good order; and that, if the mayor and burgesses made an order for the defendant to deliver the meal to the owner, such order was only verbal, and not in writing; and that if he had offered any contempt to such verbal order, he ought to be punished there where the supposed offence was done.

A town clerk who attaches and sells goods in a market brought in to a market instead of taking bail from the of fender to answer the charge, is liable to an attach ment.

Per Cur. It is true he swears that he had only a verbal order to deliver the meal, but yet that can be no excuse to him, because he is the very person (being the town clerk) who should have entered the order in writing.

CLERK OF THE TREASURY.

The clerk of the treasury, or, as he is usually called, the *custos breviarum*, appoints the clerks of the inner and upper treasury, and the clerk of the outer treasury. These officers attend at the treasury chamber every day in term, during the sitting of the Court.

CLIPPING. See tit. *Coin*.

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CLOSE. See tit. *Ejectment*; *Trespass*.

CLOTHIER.

REX v. HAYWOOD. T. T. 1813. K. B. 1 M. & S. 624.

The 13 G. 1. c. 23. s. 5. does not extend to demands against clothiers by the owner of a scribbling and carding mill for work done in twisting, &c. wool.

A rule nisi had been obtained for a *mandamus* to certain justices, commanding them to summon certain persons, and to hear and examine upon oath the demands of one A. B., against the said persons respectively, and to adjudge such satisfaction, and to give such costs and damages to the party grieved, as in the discretion of the said justices should seem reasonable, according to the 13 G. 1. c. 23. s. 5. passed for settling disputes between clothiers, or makers of woollen goods, and weavers, and persons employed in such manufactures. It appeared from affidavits that the debts were incurred for work and labour done by A. B., for the said clothiers at their request, in the course of manufacturing woollen cloths, viz. in tearing, scribbling, carding, and stubbing, their wool at his mill, which is a process towards the making of cloth the wool undergoes between the time of its coming out of the wool-stapler's hands and its being delivered to the weaver. It was shown, that formerly the whole work which is now done at the mill was performed at the weaver's house. Under these circumstances cause was shown against the rule, upon two grounds; 1st, that the person applying was not within that class of persons described in the 13 Geo. 1. c. 43; and 2d, that the work out of which the demand arose was not that description of work which is within the statute. The Court discharged the rule, and said: it seems to us that there is considerable weight in the objection, that the preparing materials for making cloth was not a work within the intention of the legislature when they passed this act, it not being clearly a work done in the process of weaving, or in the manufacture of cloth or woollen goods, but in the course of a process which appears to be preparatory to that of the weaver. But the Court is not called upon to determine on that ground, because it is by no means clear that the legislature ever meant to subject the disputes between such parties as these, to the summary jurisdiction of the magistrates. From the second section of the act, it is evident that the statute relates to cases where parcels of wool have been delivered out to the various workmen in order to be worked up by them immediately after such delivery. It provides for the weight by which the wool is to be given out, and also for an ulterior process of the manufacture, by providing that the clothier shall receive back the same by the same weight, without fraud or deceit, under a penalty. But how can he receive back the same weight, in this instance, when it appears that by the scribbling the weight must be materially diminished? The fifth section is also confirmatory of our decision, from the use of the words *work, wages, and damages*; they being all indicative of an intention in the legislature to interpose the summary authority of justices in those cases only where disputes and demands had to be settled between the clothiers and makers of woollen goods, and the persons employed in such manufacture as their *servants*, and not to extend the remedy to demands between parties of equal rank in trade, such as in the present case, between clothiers and master manufacturers. The 14 Geo. 3. c. 25. which makes it an offence punishable with imprisonment if the inferior class of workmen there enumerated do not return the implements of their trade, entrusted to them by their employers, bears us also out in the construction we have put upon the act in question. And it is observable, that at the time when this statute was

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passed, the work which is now done at the mill being performed at the weaver's house, the weaver was the principal servant of the clothier; and the other persons, mentioned in the act to be employed in the manufacture, were his family or his neighbor's children, taken into his house; but the same work is now done by masters employing servants under them; so that the work is now carried on between master and master, as it shows how the evils contemplated by the statute, viz., the disputes that had arisen between clothiers and makers of woollen goods, and the manufacturers employed by them, concerning the admeasurement and weight by which wool and other materials used in making up woollen goods had been delivered out to the workmen employed therein, at that period arose; and how, from the habits of trade, having subsequently taken a different turn, the statute was, comparatively speaking, in the particular department of trade under our consideration, fallen into disuse.—Rule discharged, with costs. See 1 Ann. st. 2. c. 18. s. 4.

CLOVER. See tit. *Tithes*.

CLOCKS AND WATCHES. See 9 & 10 W. 3. c. 28; 27 Geo. 2. c. 7; 37 Geo. 3. c. 108; 38 Geo. 3. c. 40.

COLE SEED. See tit. *Tithes*.

CLUB. See tit. *Contract*.

COACH-MAKER. See tit. *Apprentice*.

COACH-OWNER. See tit. *Carrier; Driving; Stage Coach*.

COAL-MINE. See tits. *Mines; Rent; Trespass*, and, for the statutes relating thereto, tit. *Coals*.

COAL-NOTE. See tit. *Bills and Notes*.

COALS. See 30 Car. 2, st. 1. c. 8; 6 & 7 W. 3. c. 10; 12 Anne, st. 2. c. 17. s. 11; 11 Geo. 2. c. 15; 17 Geo. 2. c. 35, 15 Geo. 3. c. 27; 31 Geo. 3. c. 36; 43 Geo. 3. c. 134; 47 Geo. 3. c. 68; 10 Geo. 2. c. 32; 13 Geo. 2. c. 21; 9 Geo. 3. c. 29, 39 & 40 Geo. 3. c. 77; 56 Geo. 3. c. 125.

1. WARREN v. WINDLE. H. T. 1803. K. B. 3 East. 205.

The stat. of 26 Geo. 3. c. 108. s. 27. directed that it should commence from the 24th July, 1786, and continue till the 24th June, 1795, and from thence to the end of the then next session of parliament. Then the act of the 36 Geo. 3. c. 61. which was perhaps intended to continue that act, because it referred to the period of continuance, thereby or through mistake re-enacted several former acts, which were intended by the provision of the 26 Geo. 3. to have expired, and totally omitted the latter, which therefore expired at the end of the next session of parliament after June, 1795. This mistake was afterwards rectified by the statute 42 G. 3. c. 89. which recites that the statute 36 G. 3. c. 61. was passed in order to continue the 26 G. 3; but that that act having before expired, doubts had arisen whether it were in force; it therefore enacted that the latter statute should be revived from and after the passing of this act, which was on the 23d of June, 1802. It was then suggested, that by the 42 G. 3. it was provided, that all acts, matters, and things, done or performed in pursuance of, or according to, and of the clauses, powers, or provisions of the act of the 26 G. 3. should be, and were thereby, declared to be as valid and effectual in every respect as if the said act of the 26 G. 3. had been revived and continued by the stat. 36 G. 3; and therefore that it would still operate as a subsisting law for the whole period. But the Court said, that that provision was only introduced to indemnify persons who had done acts in execution of the powers conferred by the statute for carrying it into effect; but could not be construed to remedy omissions, or secure offenders from penalties incurred under any other subsisting law at the time.

2. PARISH, *qui iam*, v. THOMSON AND OTHERS. E. T. 1803. K. B. 3 East, 525.

It was in this case made a question, whether a dealer in coals by the chaldron, who sold to another by the chaldron a certain quantity as and for 10 chaldrons of coal, pool measure, without justly measuring the same with the lawful bushel of Queen Anne, was liable to the penalty of 50*l.*, imposed by the 13th section of the stat. 3 G. 2. c. 26 upon such defaulters who sell coals by the chaldron, or lesser quantity, is liable.

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An action
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chaldron, or lesser quantity, without so measuring them. The Court said: we feel no great difficulty in disposing of this case. There are two modes of sale of this article, one by pool measure, and the other by wharf measure. The rule of selling by pool measure is given by the 10th section of the stat. 3. G. 2., by which it appears to be an allowance claimed by ancient custom in the port of London, of one chaldron to every score; the basis of which measure is the chaldron, a well known quantity, being a multiple of so many bushels. Then by the 13th section another provision is made for the prevention of fraud, whereby all sellers of coals by the chaldron, within a certain district in and about the cities of London and Westminster, are to mete their coals by a particular bushel, as described in the statute of Queen Anne. Now it is admitted that the party bought *by the chaldron*, which brings him within the 13th section. But it is said he stipulated to have *pool measure*; still, however, he bought *by the chaldron*. Thus, was he not entitled to have it measured by the bushel of Queen Anne? Clearly he was, by the express provision of the 13th section of the act; then the party not having so measured the coals is liable to the penalty inflicted by that section. Some difficulty might have arisen if the coals had been bought merely *by pool measure*, but here they were bought *by the chaldron*.

3. BUTTERFIELD V. WINDLE AND ANOTHER. M. T. 1803. K. B. 4 East, 385; S. C. 1 Smith's Rep. 65.

The declaration in an action founded on the 13th section of the 3 Geo. 2. c. 26. for a penalty of 50l. charged that the defendants on, &c., they the defendants being dealers in and sellers of coals by the chaldron or lesser quantity, within 10 miles round the cities of London and Westminster, viz. at, &c. did sell to A. B. by the chaldron a certain quantity of coals as and for five chaldrons of coals pool measure, and afterwards, &c. did deliver the said coals the said A. B. as and for five chaldrons of coals pool measure, &c. Nevertheless, the said defendants *did not justly measure* the said coals so by them sold and delivered to the said A. B. *with a bushel measure*, to wit, such a bushel as is described in the stat. 12 Ann. s. 2. c. 17; but omitted, &c. contrary to the form of the statute, &c. The venue was laid in L. where the goods were delivered; which, after verdict for plaintiff, it was now contended rendered the verdict improper, as the offence occurred where the coals were ordered.

Per Cur. Upon a view of the statute, it must have been the meaning of the legislature that the measuring should take place antecedent to putting the coals into sacks, described in a former section, (the 11th) because it requires the sellers justly to measure the coals with the bushel of Queen Anne; which bushel they are required constantly to *keep and use at their respective wharfs*, and to put three bushels of coals, *so justly measured, into each sack, which sacks*, and no other, shall be used *for the carriage of such coals to the buyers thereof*, and then it goes on to subject to imprisonment the servants of such dealers in coals who shall *fill such coals into sacks without first duly measuring* the same. Now as to the putting the coals into the sacks for the purpose of conveying them to the buyers, must necessarily be where the coals are kept, and where the bushel with which the admeasurement is to be made, is required to be constantly kept and used, and as the measuring is to take place *before* the coals are put into the sacks; for they are to put the coals *so justly measured*, into the sacks, it follows that the not justly measuring the coals is a *local omission* for a *local duty*, which in this instance was required to be performed at W. where the defendant's wharf was situated, from whence the coals were taken, and where they ought to have been measured before they were sent to the place of their delivery; and therefore the venue being laid in L. the declaration cannot be supported.

4. BUTTERFIELD V. WINDLE AND OTHERS. M. T. 1803. K. B. 4 East. 385; S. C. 1 Smith, 65.

So under
the statute
3 Geo. 2.
c. 26. s. 4.

At the trial of this cause it appeared, that a person who lived in London, went to the wharf of the defendants, which was situated in Middlesex, and there, without agreeing for any specific parcel of coals, gave a general order

for five chaldrons of Wall's End coal to be sent to his house in Fetter-lane. The coals were afterwards sent in sacks contained in two waggons, and were delivered at his house in London, but were, upon examination, found to be of an inferior quality. The plaintiff obtained a verdict for penalties incurred thereby under the st. 3 Geo. 2. c. 26. s. 4. A rule nisi was obtained for setting aside the verdict, upon the ground that the cause of action, if any, appeared by the evidence to have arisen in Middlesex and not in London, in which the venue was laid. *Per Cur.* The question is, where the sale was completed? and that we take to have been at the place of delivery. For the statute was not meant to punish the mere intention to defraud, but the persons who actually committed a fraud in furnishing the consumers with a different sort of coal from that which they bargained for. Now here that which passed between the buyer and sellers in Westminster was not an actual sale of a specific parcel of coal, but a contract for the sale of a certain quantity of coal of a particular description. To complete a sale the particular commodity must be ascertained which is the subject of sale; otherwise, if there be only an engagement to deliver a certain quantity answering to such a description, that is not a sale, but a contract merely for sale. The rule in the Digest is this: *Si aliquid quod venierit appareat quid quale quantum sit et pretium et pure venit perfectum est emptio.* (Lib. 18 tit. 8. De pericula et commodo rei venditæ.) But until it appears what is sold, it is not *perfecta*, and therefore no sale.

5. EVERETT v. TINDALL. M. T. 1804. K. B. N. P. 5 Esp. 169.

Debt to recover the penalty incurred by delivering coals short of measure; it appeared that certain persons subscribed a joint capital for the purpose of buying a quantity of coals, which were divided in different portions among the members, and paid for jointly, by one A. B. the treasurer; it was objected that plaintiff must be nonsuited, in as much as A. B. the treasurer, or the club jointly, ought to have brought the action, and not the plaintiff, who sued as if there had been a separate contract between him and the defendant. And Lord Ellenborough, C. J. held, that it was clearly a joint contract with all the members; and that if an action had been brought for not delivering the coals; all the members ought to have joined, there being no separate contract.—Non-suit.

6. PARISH v. BURWOOD. T. T. 1803. K. B. N. P. 5 Esp. 33.

Action for selling coals by a measure different from that described in the several statutes regulating the measure, and for the prevention of frauds in the sale of coals; the declaration alleged that the defendant, on, &c. did fill and sell divers sacks of coals to S. J. and T. P. as pool measure, and delivered the same to S. J. and T. P. contrary to law; the evidence proved that S. J. and T. P. purchased the coals together with one W. L. jointly, and that the coals were delivered to them; it was objected, that there was a variance, the declaration stating the coals to have been bought by two persons, when in fact they had been purchased by three. And Lord Ellenborough, C. J. was of opinion that the averment was material, and therefore the variance was fatal, and cited the case of *Bristow v. Wright*, 2 Doug. 640. as an authority in point.—Plaintiff non-suited.

7. WARREN v. WINDLE. H. T. 1803. K. B. 3 East, 205.

In March, 1802, when the offence which was the subject of this action was committed, the statute of 3 Geo. 2. c. 26. s. 13. giving a penalty against dealers of coals within the metropolis, and 10 miles round, for not justly measuring coals sold by the chaldron, according to the lawful bushel directed by the statute 1 Ann st. 2. c. 17. s. 11. was a subsisting law. The question arose whether evidence of such coals proving short upon re-measurement was admissible to prove the charge of their not having been justly measured. The Court held the evidence sufficient to support the facts necessary to be proved.

8. PITO v. HAGUE. T. T. 1804. K. B. 1 Smith's Rep. 417.

Action for several penalties of 50l. each on the 19 Geo. 2. c. 35. s. 11. for not having a coal-meter's ticket with the waggon in which the coals were carried.—To support

against selling coals represented to be of a different quality from what they really are, the offence is completed in the county in which they have been delivered, though the contract of sale was made in a different county. And all the parties to the contract for the coals must join. [495] And the declaration must state the contract accurately; therefore, where it alleged coals to have been purchased by A. and B., and it appeared that they have been bought by A. B. and C. who agreed to divide them, the variance was fatal, and cited *Holden v. Tal.* Evidence that coal short upon re-measurement, is admissible to prove the charge of their not having been justly measured according to the statute. To support

an action against the vendor of coals not having obtained a coal-meter's ticket, for a penalty of 50*l*, on 19 G. 2. c. 35. s. 11. the plain tiffs need not proceed against the offender before a justice of the peace.

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ried. Verdict for plaintiff. Motion for a new trial, or an arrest of judgment, on the following ground. The 11th clause in the statute on which this action was founded, provides, "that if any cart or carts loaded, or which shall be sent or driven from any wharf, warehouse, or place, within the city and liberties of Westminster, &c. without having first obtained such ticket as aforesaid; then, and in every such case, the vendor of the said coals, and the driver or carter of such cart, being convicted thereof by the oaths of two or more credible witnesses, before one or more of his majesty's justices of the peace, &c. shall, for every offence, forfeit and pay the respective sums following; to wit: the vendor of such coals the sum of 50*l* and the driver of such cart the sum of 5*l*." But by a subsequent clause, namely, the 21st, "the aforesaid several forfeitures and penalties, imposed and to be incurred by virtue of or under this act, shall be recovered, &c. in the manner following; that is to say: such and so many of the said forfeitures and penalties as do and shall exceed the sum of 5*l*. by action of debt, &c. in any of his majesty's courts of record at Westminster: and all other the aforesaid penalties and forfeitures shall be recovered by way of complaint made unto one or more justice or justices," &c. It was therefore contended, that either the plaintiff should have proceeded to recover the penalty before the magistrate below or that, if he is permitted to sue in the Court of King's Bench, under the last clause, yet it is a condition precedent to that action, that he should first proceed to obtain a conviction before a magistrate, and that the declaration should have stated that the defendant was thereof convicted before a magistrate.

See *per* Lord Ellenborough, C. J. I can easily see how the obscurity in the clauses has arisen. The legislature has put in a new penal clause, which, instead of coming in after the others, comes in before, but was intended to be the last clause in the statute. The whole objection proceeds upon the mistake that it is absolutely compulsory upon the party to go before a magistrate. Transpose the other clause, and it will be perfectly clear. The defendant must bring his writ of error.—Rule nisi refused.

9. *PITO v. HAGUE*. T. T. 1804. K. B. 1 Smith's Rep. 418.

A coal waggon is within the clause of the 19 G. 2. imposing penalties on the vendors of coals who do not obtain a coal-meter's ticket.

The defendant was sued for a penalty incurred under the 11th clause of the 19 G. 2. c. 35. s. 11. which provides that if any cart or carts loaded from any wharf, &c. within, &c. without having first obtained a coal meter's ticket, then the vendor of the said coals, and the driver or carter, &c. shall forfeit and pay, &c. An objection was taken at the trial that the coals were stated in the declaration to be loaded in a waggon, whereas the act contains only the words cart or carts. But the objection was abandoned.

COCK-FITTING. See tit. *Gaming; Wager*.

CODICIL. See tit. *Will*.

COFFEE-HOUSE. See tits. *Inns; Insurance*.

COFFIN. See tit. *Burial*.

COGNIZANCE. See tit. *Replevin*.

COGNOVIT.* See tit. *Ejectment*.

I. RELATIVE TO THE TIME WHEN IT MAY BE GIVEN,
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II. _____ STAMP AND FORM OF,

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(B) _____ FORM, p. 498.

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V. _____ ITS EFFECT AND OPERATION, p. 501.

VI. _____ THE JUDGMENT ON, p. 501.

VII. _____ ACTIONS ON COGNOVITS GIVEN IN IRELAND, p. 502.

* A *cognovit* is a written confession of the cause of action, or amount of the debt or damages. This acknowledgment is usually given when the defendant has no available defence to save the expence of executing a writ of inquiry, and to stay execution, upon condition that the giver shall be allowed a certain time for the payment of the debt or damages, or of part, or of the whole, of the cause of action; see 1 Sellon, 878.

VIII. RELATIVE TO COSTS, p. 503.

I. RELATIVE TO THE TIME WHEN IT MAY BE GIVEN.

1. WALKER V. WOOL. EY. H. T. 1736. K. B. 7 T. R. 207.

Judgment had been signed upon a *cognovit*, without first filing a bill against the defendant, who was an attorney, which was holden to be irregular; but it having been done at the request of the defendant, to save expence, the Court granted leave to file the bill *ante pro tunc*, and directed him to pay all costs. *Although in K. B. a cognovit cannot regularly be given before declaration, yet a bill by leave of the Court, may be filed nunc pro tunc.*

2. W. B. V. ASPINALL. T. T. 1817 C. P. Taunt. 701; S. C. 1 Moore, 429.

Application to set aside a judgment signed on a *cognovit*, on the ground that the *cognovit* had been given immediately after the arrest, and before declaration, and therefore void. But the Court, after consulting the officers, declared, it had been the constant practice in the C. P. to take *cognovits* before declaration, and consequently the objection could not prevail. *And in the C. P. it may be taken before declaration.*

3. WADE V. SWIFT. M. T. 1820. Ex. 8 Price, 513.

Rule to set aside a judgment signed on a *cognovit*. It appeared that no process had been actually served on the party to warrant it; but it was sworn that the attorney had before it was executed, though on the same day, written to his agent, with instructions to sue out a *quo minus*, which was accordingly issued, though tested after the date of the *cognovit*. The Court held, under the circumstances, that the *cognovit* had been properly taken.—Rule discharged with costs. *And in the Exchequer, before even process has been actually sued out.*

II. RELATIVE TO THE STAMP AND FORM OF.

(A) AS TO THE STAMP.

1. AMES V. HILL. E. T. 1800. C. P. 2 B. & P. 150.

On a rule *nisi* to set aside a judgment entered upon a *cognovit*, on the ground that the instrument was in nature of an agreement, and therefore should have been stamped, it appeared that it was stipulated that on payment of the sum of 5*l.* with costs, by instalments, no judgment should be entered up. Lord Eldon, C. J. observed, that though a *cognovit*, as such, or an authority to enter one, required no stamp, yet, if the instrument bore evidence of mutual agreement, the statute would apply; and held that the present case fell within the provisions of the stamp act. See 1 N. R. 279. *[498] A cognovit does not require a stamp, unless it contain terms of agreement.*

2. REARDON V. SWABY. T. T. 1808. K. B. 4 East, 188.

Application to set aside a judgment on a *cognovit* for irregularity, on the ground that the instrument had not been stamped. The Court made the rule absolute, it appearing that the *cognovit* contained an agreement to take the debt by instalments. *As to take the debt by instalment.*

3. AMES V. HILL. E. T. 1800. C. P. 2 B. & P. 150.

By a *cognovit*, confessing damages to the extent of 30*l.*, it was agreed that judgment should not be entered till default was made in payment of the sum of 5*l.* by instalments. On default, and judgment entered thereon, a rule *nisi* to set it aside was obtained, on the ground that the instrument was an agreement for a greater sum than 2*l.* within the stat. 28. Geo. 3. c. 58. s. 4. But the Court held otherwise.—Rule discharged. *And in order to bring the case within the provisions of the stat. 28. Geo. 3. c. 58. s. 4. the sum secured must be above 20*l.**

(B) AS TO THE FORM.

A *cognovit* given before plea should state the confession, the amount of the debt or damages, the terms upon which the *cognovit* is given, and the agreement by defendant not to file a bill in equity nor bring a writ of error; see *post*, 501. n. and 1 Sellon, 372; 1 Tid. 8th ed. 607. And when given after plea, it should also contain an agreement to withdraw the plea, in which case it is termed a *cognovit actionem relicta verificatione*, from the form of the entry of it upon the roll; see 1 Sellon, 372.

By the 3 Geo. 4. c. 39. if any *cognovit actionem* shall be given, subject to any defeasance or condition, such defeasance or condition shall be written on the same paper or parchment, on which such *cognovit actionem* shall be written, before the time when the same, or a copy thereof respectively, shall be filed, otherwise such *cognovit actionem* shall be null and void.

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The rule interdicting warrants of attorney from being executed by a party in custody of a sheriff's officer, without an attorney being present on behalf of the prisoner;

Applies in the C. P. to cognovits;

And the attendance of his clerk in such case is unavailable.

But in the K. B. it has been held on, that a cognovit is not within the preceding rule, or that of 4 G. 2. prohibiting any warrant of attorney being given, unless in the presence of the defendant's attorney;

Though if it be given by a prisoner or even in custody of plaintiff's attorney the same

III. RELATIVE TO ITS EXECUTION.

1. *REX. V. GEN. E. T. 1662 K. B. and C. P.*

It is ordered that no bailiff or sheriff's officer shall presume to exact or take from any person being in his custody by arrest, any warrant to acknowledge a judgement, but in the presence of an attorney for the defendant, which attorney shall then subscribe his name thereto, which said warrant shall be produced when the judgement shall be acknowledged; and if any bailiff or sheriff's officer shall hereafter offend, or do contrarywise, he shall be severely punished for so doing. And it is further ordered, that no attorney shall from henceforth acknowledge or enter, or cause to be acknowledged or entered, any judgement by colour of any warrant gotten from any defendant being under arrest, otherwise than as aforesaid.

2. *WEBB AND ANOTHER V. ASPINALI T. T. 1817. C. P. 1 Moore. 428; S. C. Taunt. 701; See PARKINSON V. CAINES. E. T. 1790. 3 T. R. 617.*

In this case the defendant, being arrested, entered into a *cognovit* at the office of the plaintiff's attorney, no attorney on his part being present. An affidavit of one of the plaintiffs in the cause was produced, stating, that he was ignorant of the defendant's being in custody at the time, as he came to the office alone when he executed the *cognovit*; on a rule being obtained for his discharge, it was held by Gibbs C. J. that the presence of the defendant's attorney when the *cognovit* was executed was indispensable.—Rule absolute with costs.

3. *PAUL V. CLEAVER. E. T. 1810. C. P. 2 Taunt. 360; S. P. ARNOLD V. LOWE. T. T. 1817. C. P. 7 Taunt. 703.*

The defendant being arrested on mesne process, while in custody proposed to give a *cognovit* for the debt and costs, with a stay of execution, to which the plaintiff assented, and a *cognovit* was prepared, and signed by the defendant in the presence only of the clerk of her own attorney; whereupon the defendant obtained a rule to set the *cognovit* aside, on the ground that the presence of an attorney on his behalf was indispensable. And of that opinion were the Court, who held the presence of the attorney's clerk of no avail. They made the rule absolute, directing the defendant to pay the costs of the application.

4. *LEE V. THURSTON. E. T. 1819 K. B. 1 Chit. Rep. 267.*

A *cognovit* had been given by defendant. It was now moved to set aside the judgement and execution thereon, on the ground that the *cognovit* had been given by defendant whilst in custody under mesne process, without an attorney on his behalf being present, contrary to the rule of 15 Car. 2. declaring all warrants to acknowledge a judgment taken from parties while in prison void under such circumstances; and to the rule of 4 G. 2. providing that such formality shall be observed in all cases of execution of warrants of attorney by persons in custody for the confession of judgment. It was urged that a *cognovit* was within the spirit of these rules, their object being to prevent persons under imprisonment from being prevailed upon to enter into improvident terms on condition of obtaining their liberation.

Per Cur. In the rule of 4 G. 2. the words are "warrant of attorney executed." A warrant to confess a judgement is a very different thing from the act of confessing. A warrant of attorney is an authority to sign judgement, but a *cognovit* amounts to an actual confession. A warrant to acknowledge is not the same thing as an actual acknowledgement. As we cannot, therefore, enlarge the construction of these rules, the *cognovit* must be considered valid in the absence of any affidavits showing that any undue advantage had been taken of the defendant.—See 3 T. R. 616; 1 East. 241; 7 T. R. 20; 1 Moore 428; Imp. K. B. 486; Tidd. 573; 4 Taunt. 797; 1 T. R. 715

5. *PARKINSON V. CAINES. E. T. 1790. K. B. 3 T. R. 616.*

The defendant, a prisoner in the King's Bench, in order to save expenses proposed to confess judgment, and offered to give a *cognovit* for 200*l.* with a defalcance, on payment of 49*l.* the sum due and 8*l.* costs, then, &c.; the plaintiff's attorney drew up the *cognovit*, and the defendant asked his attorney to peruse it previous to his affixing his signature, which the plaintiff's attorney

said was unnecessary, and therefore he signed it, no attorney on his behalf *shall*, with being present. A rule was obtained to show cause why the *cognovit* and judgment thereon should not be set aside on the ground that no attorney was present at the execution of the *cognovit*, as directed by the rule of court, 15 Car. 2. On showing cause, it was contended that the defendant was not comprehended within the rule, inasmuch as that rule only applied to prisoners in custody of a bailiff or sheriff's officer, and not to those in the custody of the marshal. But the Court overruled the objection, observing, that although this case was not strictly within the rule, it was necessary to guard ignorant against designing persons, and that the defendant was entitled to relief, as the plaintiff had acted improperly in taking a *cognovit* for such a large amount in the absence of an attorney on the defendant's behalf. See 1 East, 241; 2 Taunt. 360.

IV. RELATIVE TO ITS BEING FILED

1. REG. GEN. H. T. 1820. K. B. 5 B. & A. 560; S. C. 1 D. & R. 471.

It is ordered in the K. B. that no judgment can be signed upon any *cognovit* without such *cognovit* being first produced to the clerk of the dockets, and after taxation of the costs, filed with him. By the 3 Geo. 4 c. 39. s. 3. it is enacted that every *cognovit actionem* given by any defendant in any personal action, in case the action in which such *cognovit actionem* shall be given, shall be in the Court of King's Bench, or a true copy of such *cognovit actionem*, in case the action wherein the same is given shall be in any other Court, shall, together with an affidavit of the time of the execution thereof, be filed with the said clerk, in like manner as warrants of attorney, or copies thereof, and affidavits within the space of 21 days after such *cognovit actionem* shall have been executed; otherwise such *cognovit actionem*, and any judgment entered up thereon, and any execution taken out on such judgment, shall be deemed fraudulent and void against the assignees of the person giving such *cognovit actionem* under a commission of bankrupt issued against him, after the expiration of the said space of 21 days, in like manner as warrants of attorney, and judgments and executions thereon, are deemed and taken to be fraudulent and void by that act.

a defence for an exorbitant amount it is void.

Within 21 days after its execution.

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V. RELATIVE TO ITS EFFECT AND OPERATION.*

As to its operation as a discharge of bail, see ante, vol. p. 293; as to its being discharged by bankruptcy, see ante, vol. 3. p. 659; and post. tit. Sheriff.

1. DAVIS v. HUGHES. E. T. 1797 K. B. 7 T. R. 206.

On motion to set aside an execution, it appeared, that the writ was returnable in T. T. at which time the defendant gave a *cognovit*, but judgment had not been signed till H. T. after which term common bail was filed. It was contended to be irregular, since the plaintiff could not file common bail according to the statute after the succeeding term after the writ is returnable. To which it was replied, that giving a *cognovit* estopped the defendant from objecting to the irregularity; and common bail having been entered *nunc pro tunc*, it was sufficient. The Court, concurring, discharged the rule.

A *cognovit* is a waiver of the objection of common bail not having been filed by the plaintiff in due time.

VI. RELATIVE TO JUDGMENT ON.†

ANON. M. T. 1697 K. B. 1 Salk. 400.

A motion was made to set aside an execution on a judgment, upon sugges-

* A *cognovit* is no bar to a writ of error, unless it be expressly stipulated that it shall have that effect; see Wade v. Rogers, 2 Blac. Rep. 780. A *cognovit* given for part of the plaintiff's demand, does not preclude him from proceeding for the residue; see 1 Tidd. 578, 7th edit.

† If the *cognovit* be of the whole, and unconditional, the plaintiff may immediately sign final judgment, and take out execution thereon; but if it be not of the whole, he can only sign judgment for the part confessed, and the plaintiff must proceed for the residue; see 1 Tidd, 578, 7th edit. The Court will in all cases set aside a judgment entered up, and executions taken out, contrary to the agreement of the parties at the time of confessing the judgment; 6 Mod. 14; 7 Taunt. 9.

The judgment on a *cognovit* must be re-

gulated by the terms of the instrument, and cannot be varied by a subsequent contract.

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tion of an argument, between the parties, made after the judgment given, viz. that the judgment should be upon such and such terms. *Et per Holt, C. J.*: where a judgment is confessed upon terms, it being in effect but a conditional judgment, the Court will lay their hands upon it, and see the terms performed; but when a judgment is acknowledged absolutely, and a subsequent agreement made, this does no way affect the judgment, and the Court will take no notice of it, but put the party to his action on the agreement, and in this case the agreement being only under their hands, it is no ground for an *audita querela*; and the Court cannot hold plea of an agreement upon a motion.—See 6 Mod. 14.

The assignee of an Irish judgment by a *cognovit*, may, under the Irish statutes 9 Geo. 2, c. 5. and 25 Geo. 2, c. 14. sue in his own name. These acts it seems, are confined to judgments by *cognovit*.

VII. RELATIVE TO ACTIONS ON JUDGMENTS IN COGNOVITS GIVEN IN IRELAND

O'CALLAHAN v. THOMOND. T. T. 1810. C. P. 3 Taunt. 82.

A declaration in debt set out the 9 Geo. 2. c. 5. and 25 Geo. 2. c. 14; the first of which, after reciting that judgments, statutes staple, and statute merchants are frequently assigned for valuable considerations, and to protect the purchase of estates, but are no more than equitable securities in the hands of the assignees; and that assignees of such judgments, statutes staple, or statutes merchants, as the law then stood, could not revive or discharge the same in their own names, but in the name of the conusees of such judgments, statutes staple or statutes merchant, or their representatives, which was often attended with very great inconveniences; and the conusee might, after such assignment, enter satisfaction on the record of such judgments, statutes staple or statutes merchant, without the knowledge or consent of the assignee, enacts, "that where any conusee or conusees of a judgment or judgments, statute staple or statute merchant, his, her, or their executors or administrators, shall assign the same, such conusee or conusees, his, her, or their executors or administrators, shall also perfect a memorial of such assignment," with such formalities as therein are mentioned. The second section enacts, "that after such memorial enrolled, such assignee or assignees, and no others, may, in their own names, revive such judgment, statute, &c. and take out execution, discharge the same, and enter satisfaction on the record; and that the conusor or conusors of such judgment or judgments, statute, &c. his, her, or their executors, administrators, or assigns, may, upon payment to such assignee or assignees, plead payment specially to such assignee or assignees." The stat. 25 Geo. 2. c. 14. which is entitled "An Act to explain and amend" the former act, after reciting that some doubts had arisen upon the construction of the former act, so far as the said act relates to the assignment of judgment, and statutes in the several courts of law therein mentioned, for the removing of such doubts, declares, "that every assignee or assignees of every judgment or judgments, statute staple or merchant that were there assigned, or which thereafter should be assigned on record, by virtue of the said act, his, her, or their executors, administrators, or assigns, may not only revive such judgments, &c. from time to time, his, her, or their own name or names, and take out one or more execution or executions thereon for the recovery of his, her, or their demands thereon, or by the said act among other things is directed; but also that such assignee or assignees of such judgment, &c. now assigned or hereafter to be assigned by virtue of the said act, his, her, or their executors, administrators, and assigns, may bring an action of debt, or otherwise proceed to sue thereon, in his, her, or their own name or names, and be considered, to all intents and purposes, in the place, stead, and condition, either in law or equity, of the assignor or assignors; and then alleged that a judgment had been recovered, and proceeded to show an assignment to the plaintiff. On demurrer, it was objected, that the statutes were meant to apply to all judgments and not to *cognovits* only, for there are no means to distinguish, on the record of judgment, whether it passed on a *cognovit* or otherwise. But the Court and its officers denied this holding, that it was confined to judgment by *cognovit* only.

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VIII. RELATIVE TO COSTS.

BOOTH v. ATHERTON. M. T. 1795. K. B. 6 T. R. 144.

On a rule to show cause why the master should not review his taxation of costs, it appeared that after argument of a special case, the Court, being of opinion that the case was insufficiently stated, directed a new trial; however, the defendant, without proceeding to a second trial, executed a *cognovit*; the question was, whether the plaintiff was entitled to the costs of the first trial. The Court made the rule absolute; directing the master to review his taxation by allowing costs.

COHABITATION. See tits. *Adultery; Baron and Feme; Bastard.*

CO-HIER. See tit. *Heir.*

If a case is served be sent down to be rested, and the defendant without going to trial, gives a *cognovit*, the plaintiff is entitled to the costs of the first trial.

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Coin and Coinage.

(A) RELATIVE TO THE MEANING OF THE TERM "COIN," p. 507.

(B) RIGHT OF COINAGE, p. 507.

(C) INSTRUMENTS OF COINAGE.

(a) As to offences connected with.

1st. As to what constitutes such offences, p. 509.

2d. As to the indictments and subsequent proceedings incident thereto.

1. As to the indictment, p. 514. 2. As to the pleas, p. 514. 3. As to the evidence, p. 514. 4. As to the witnesses, p. 515. 5. As to the judgment and punishment, p. 515.

(D) RELATIVE TO COUNTERFEITING THE COIN.

(a) Of this realm.

1st. As to the king's money, p. 516.

2d. copper coin of this realm, p. 517.

(b) Of other countries, p. 517. (c) As to what will constitute the offence, p. 517. (d) As to the parties by whom the offence may be committed, p. 519.

(e) As to the indictment and proceedings incident thereto.

1st. With reference to the king's money.

1. As to the indictment, p. 520. 2. As to the pleas, p. 621. 3. As to the evidence, p. 521. 4. As to the witnesses, p. 522. 5. As to the judgment and punishment, p. 522. 6. As to the prosecutor's reward, p. 522.

2d. With reference to the copper coin of this realm.

1. As to the indictment, p. 522. 2. As to the pleas, p. 523. 3. As to the evidence, p. 523. 4. As to the judgment and punishment, p. 523.

3d. With reference to foreign coin, p. 523.

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(E) RELATIVE TO IMPAIRING THE COIN.

(a) As to what constitutes the offence, p. 523.

(b) As to the parties by whom the offence may be committed, p. 524.

* Among the impediments to commerce, the most prominent, undoubtedly, is the charge of conveyance from place to place. This is the great obstacle which limits the exchange of commodities from one extremity of the world to another. Whenever the charges of carriage rise to such an amount as to equal the effectual return in any remote market, the motive for conveying merchandize to that place ceases. If goods were always exchanged for goods, it is clear that the conveyance, under the uncertainty of disposal, would take place to a very small distance indeed, and the labour required to discover the persons willing to exchange would greatly enhance the charge. In fact, it is here impossible to enumerate and describe the expedients, moral as well as mechanical, by which these difficulties are in fact subdued, and still more to deduce their origin and general effects. One of the chief of these expedients consists in the use of some article of merchandize, as the medium of exchange which shall be acceptable to every man, and will be, therefore, received and held by the seller of any commodity until he shall meet with another individual who he knows will again take it for the article he wants. In the Island of Madagascar, it is said, that the exchangeable value of goods is reckoned in hatches, ballocks, and slaves; these commodities being universally vendible, and for that reason every where received. Smith affirms, that nails answered the same purpose in some parts of Great Britain. These and other instances may serve to show how a preferable medium of exchange becomes adopted; and it will without difficulty be seen, that the scarcest and least destructible metals must have at length become the universal substitute; for their value does not depend on their figure; they may be subdivided and joined again without loss; they receive no injury by keeping; and the labour of conveying them from place to place forms a less part of their value than of any other article.

(c) As to the indictment and proceedings incident thereto.

1st. As to the indictment, p. 524. 2d. As to the pleas, p. 524. 3d. Evidence, p. 524. 4th. As to the witnesses, p. 524. 5th. As to the judgment and punishment, p. 524.

(F) AS TO THE IMPORTATION OR EXPORTATION OF COUNTERFEIT OR LIGHT MONEY.

(a) With reference to the importation of such money, p. 524.

(b) ————— exportation of such money, p. 525.

(G) RELATIVE TO RECEIVING, UTTERING, OR TENDERING COUNTERFEIT COIN.

(a) Of this realm.

1st. As to receiving, paying, or putting off, &c.

1. The king's money.

(a 1) As to what constitutes the offence, p. 526. (b 1) As to the parties by whom the offence may be committed, p. 527. (c 1) As to the indictment and proceedings incident thereto.

(a 2) As to the indictment, p. 528. (b 2) As to the pleas, p. 528. (c 2) As to the evidence, p. 529. (d 2) As to the judgment and punishment, p. 529.

2. The copper coin of this realm.

(a 1) As to what constitutes the offence, p. 529.

(b 1) As to the parties by whom the offence may be committed, p. 529.

[506] (c 1) As to the indictment and proceedings incident thereto.

(a 2) As to the indictment, p. 529. (b 2) As to the pleas, p. 530. (c 2) As to the evidence, p. 530. (d 2) As to the judgment and punishment, p. 530.

2d. As to uttering or tendering counterfeit money in payment.

F. Of this realm.

(a 1) As to what constitutes the offence, p. 530.

(b 1) As to the parties by whom the offence may be committed, p. 532.

(c 1) As to the indictment and proceedings incident thereto.

(a 2) As to the indictment, p. 532. (b 2) As to the pleas, p. 534. (c 2) As to the evidence, p. 534. (d 2) As to the judgment and punishment, p. 536.

2. Of other countries.

(a 1) As to what constitutes the offence, p. 536.

(b 1) As to the parties by whom the offence may be committed, p. 537.

(c 1) As to the indictment and proceedings incident thereto, p. 537.

(H) RELATIVE TO BUYING AND SELLING THE CURRENT COIN.

(a) As to what constitutes the offence, p. 537.

[507] (b) As to the indictment and proceedings incident thereto!

1st. As to the indictment, p. 538.

2d. ————— pleas, p. 533.

3d. ————— evidence, p. 538.

4th. ————— judgment and punishment, p. 538.

(A) RELATIVE TO THE MEANING OF THE TERM COIN.

Coin, in its general sense, signifies merely a metal measure of a particular form, weight, and quality, which represents the value of all commodities within the kingdom, or state, in which it is made current by the authority of the government.*

(B) RELATIVE TO THE RIGHT OF COINAGE:

As money is the medium of commerce, it is the king's prerogative, as the arbiter of domestic trade, to give it authority to make it current. His majesty may legitimate foreign coins. and make them current here, declaring at what value they shall be taken in payment; and may, at any time, decry any coin of the kingdom, and make it no longer current; see 1 Hl Com. 276, and Chit-

* Coin, in French, signifieth a corner, and from thence hath its name, because in ancient times money was square, with corners, as it is in some countries to this day; 1 Inst. 207. The word doth properly signify a wedge, as the Latin *cuneus*; and hath a verb belonging to it in the several languages, and is translated to lawful money; either from the form of a wedge, ignot, or lingot (*linguetta*), in which bullion was transported from all antiquity; or else from the instrument, a wedge or chisel, with which, in trade, these lingots were occasionally cut to the weight required, as they are to this day in the East Indies with sheers.

ty's (Junior) Prerogatives of the Crown, 196. This prerogative may be considered in three different views. 1st. With reference to the materials; 2d. The impressions; and 3d. The denomination or value. With regard to the materials, Sir Edward Coke lays it down (2 Inst. 573.) that the money of England must either be of gold or silver; and none other was ever issued by the royal authority till 1672, when copper farthings and halfpence were coined by King Charles the second, and ordered by proclamation to be current in all payments under the value of sixpence, and not otherwise. But this copper coin is not upon the same footing with the other in many respects, particularly with regard to the offence of counterfeiting it; see 1 Bl. 277. It seems, therefore, that the king may make money of other materials than gold, silver, and copper; though such money would not, in various respects, be protected by laws which relate to other coin; see Chitty's (Junior) Prerogatives of the Crown, 197. As to the impression, the stamping thereof is the unquestionable prerogative of the crown; for though divers bishops and monasteries had formerly the privilege of coining, yet, as Sir Matthew Hale observes, (1 Hist. P. C. 191; 1 Bl. 277.) this was usually done by special grant from the king, or by prescription, which supposes one; it therefore was derived from, and not in derogation of, the royal prerogative. Besides they had only the profit of their coinage, and not the power of instituting either the impressions or denominations; but had usually the stamp sent them from the Exchequer.

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The denomination or value for which the coin is to pass current is likewise in the breast of the king; and, if any unusual pieces are coined, the value must be ascertained by proclamation. In order to fix the value, the weight and the fineness of the metal are to be taken into consideration together. When a given weight of gold or silver is of a given fineness, it is then of the true standard, and called easterling or sterling metal. Whether the king can legally change the established weight or alloy of money, without an act of parliament, seems not to be quite clear. By the stat. 25 Ed. 3 & 5. c. 13. it is "accorded and established, that the money of gold and silver which now runneth shall not be impaired in weight nor alloy; but as soon as a good way may be found, that the same be put in the ancient state, as in the sterling." Lord Coke, 2 Inst. 575. & 7. in his comment of *articuli super cartas*, c. 20. 21. cites, amongst other acts and records, this statute of the 25 Ed. 3. and the Mirror of Justices, c. 1. s. 3. "*Ordein fuit que nul roy de ce realme ne poit changer sa money ne impayre ne amender ne autre money faire; que de or ou d'argent sans assent de tous ses counties?*" in support of his opinion against the king's right to alter money in weight or alloy. Lord C. J. Hale, (1 Hale, P. C. 192.) differs with Lord Coke, and relies, 1st. Upon the "*case of mixt monies*;" (Davis, Rep. 18.) 2d. on the practice of enhancing the coin in point of value and denomination, which he observes has nearly the same effect as an embasement of the coin in the species; and lastly, on the attempts which have been made to restrain the change of coin without the consent of parliament. In the case reported by Sir John Davis, it appears that Queen Elizabeth sent into Ireland some mixed money, and declared by proclamation that it should be current and lawful Irish money. This money was certainly held to be the legal coin of Ireland; but it is most probable, that as the case was in Ireland, the stat. 25 Ed. 3. and the other acts cited by Lord Coke were not considered in discussing it, as it is clear, from one of Poyning's laws, (see Irish stat. 10 H. 7. c. 22; 1 Bl. Com. 103. 4 Inst. 351; 8 St. Tr. 343.) they might have been. And it is a fair presumption that those statutes were not brought before the Court, no mention being made of them, though Sir John Hale himself admits that the stat. of Ed. 3. is against his opinion. As to the practice mentioned by Lord Hale, of enhancing the coin in point of value and denomination, that seems very distinguishable from altering the species or material of coin, by changing its weight or alloy. Even admitting the existence of a practice to embase coin in the alloy, still little importance will be attached to it, when it is remembered how frequently some kings have endeavoured to extend the limits of their prerogatives. The attempts which have been made to restrain the change of coins

[509] without consent of parliament, prove but little in favour of Lord Hale's opinion; for those attempts might have been so made in order to restrain the exercise of a prerogative which was denied, and it does not appear that they were made in order to overturn a prerogative, the legal existence of which was admitted. The authority of Sir Wm. Blackstone may perhaps turn the scale in favour of Lord Coke's opinion, if that opinion required it. He observes, (1 Bl. Com. 273.) "that the king's prerogative seemeth not to extend to the debasing or enhancing the value of the coin below or above the sterling value, though Sir Matthew Hale appears to be of another opinion" It need only be added, that the stat. 14. Geo. 3. c. 92. seems to furnish an inference, that the standard weight of the gold and silver coin of the kingdom is unalterable, but by act of parliament. If Lord Coke's opinion be correct, it seems, as laid down by Sir W. Blackstone, that the king must fix the value of foreign money rendered current in this country by comparison with the standard of our own coin; otherwise the consent of parliament will be necessary.

No proclamation seems necessary to the legitimation of money coined by the royal authority in this country, (1 Hale, P. C. 196. 7. and 8.) unless unusual pieces be coined; but such proclamation is essential to the legitimation of foreign coin made current here; see Chitty's (Junior) Prerogatives of the Crown, 127, 198; see 6 Geo. 4. c. 79.

(C) RELATIVE TO THE INSTRUMENTS OF COINAGE.

(a) *As to offences connected with.*

1st. *As to what constitutes such offences.*

Making,
mending,
or having in
possession;

1. The statutes 8 & 9 W. 3. c. 26. s. 1. made perpetual by 7 Ann. c. 25. enacts, that no smith, &c. or other person whatsoever (other than the persons employed in his majesty's mint, in the town of London or elsewhere, and for the use and service of the said mints only, or persons authorized by the Lords Commissioners of the Treasury, or Lord High Treasurer of England for the time being,*) shall knowingly *make or mend*, or proceed to make or mend, or assist in the making or mending of any *punchcon, counter punchcon, matrix, stamp, dye, pattern, or mould*, of steel, iron, silver, or other metal or metals, or of spaud or fine foundry's earth, or sand, or of any other materials whatsoever, in or upon which there shall be, or be made or impressed, or which will make or impress the figure, stamp, resemblance, or similitude, of both or either of the sides or flats of any gold or silver coin within this kingdom; nor shall knowingly *make or mend*, or begin, or proceed to make or mend, or assist in the making or mending of any *edger or edging tool, instrument, or engine*, not of common use in any trade, but contrived for marking† of money round the edges with letters, gravings, or other marks or figures, resembling those on the edges of money coined in his majesty's mint, nor any *press for coinage, nor any cutting engine*, for cutting round blanks, by force of a screw, out of flat bars of gold, silver, or other metal; nor shall knowingly *buy or sell, hide or conceal*, or without lawful authority or sufficient excuse for that purpose, knowingly have in his or their houses, custody, or possession, any such *punchcon, counter punchcon, matrix, stamp, dye, edger, cutting engine, or other tool or instrument before mentioned*. And every such offender and offenders, their counsellors, promoters, aiders, and abettors, shall be guilty of high treason.

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Or convey
ing out of
the mint a
ny coining
instru-
ments;

The second section of the same statute enacts, that if any person shall, without lawful authority for that purpose, wittingly or knowingly convey or assist in conveying out of any of his majesty's mints, any *punchcon, counter punchcon, matrix, dye, stamp, edger, cutting engine, press, or other tool engine, or instrument, used for or about the coining of monies* there, or any useful part of such tools or instruments, such offenders, his counsellors, aiders, or abettors, as also all and every person and persons knowingly receiving, hiding, or concealing the same, shall be adjudged guilty of high treason, and, being convicted or attained thereof, shall suffer death.

* It would seem to be material, in an indictment on this act, to insert what is inclosed in the above recital within brackets; see 1 East, P. C. c. 4. s. 15.

† In the black letter folio copy of the statutes, the word is "making;" see 1 East; P. C. 167.

2. **REX v. SUTTON.** E. T. 1736. K. 1. Rep. Temp. Hard. 370; S. C. 2 Str. Are. (be sides hav
1074; S. C. 1 East, . . C. 172. ing in some instances rendered parties sub
ject to in
dictments
for misde
meanors at
common
law, as
prisoner
was convic
ted of hav
ing tools in
his posses
sion with in
tent to use
them;

An indictment, which was framed as for a misdemeanor at common law, charged that the defendant, without any lawful authority, had in his custody and possession two iron stamps, each of which would make and impress the figure, resemblance, and similitude of one of the sceptres impressed upon the current gold coin of this kingdom called half-guineas with the intention of making the impression of sceptres on divers pieces of silver coin of this realm, called sixpences, and to colour such pieces of the colour of gold, and fraudulently to utter them to his majesty's subjects as lawful guineas, against the peace, &c. *Lord Hardwicke* doubted, at the assize whether the bare possession was unlawful, unless made use of, or unless made criminal by statute; but, upon the indictment being removed into this Court by *certiorari*, *Page*, *Probyn*, and *Lee, Js.* held that the bare having such instrument in possession with the intent charged, was a misdemeanor.

3. **REX v. HEATH.** E. T. 1810. K. B. 1 Russ. & Ry. Crown. C. 184.

The defendant had been indicted for having counterfeit silver in his possession, with intent to utter it as good. The whole judges held, this did not amount to a misdemeanor, as such facts showed *no criminal act* on the part of the defendant, which was essential; and said, that the case of *Rex v. Sutton, supra*, which had been cited, was untenable. See Russ. and Ry. 288. 308.

4. **REX v. LENNARD.** E. T. 1772. C. P. 2 Blac. 807; S. C. 1 East, P. C. 170; S. C. 1 Leach, C. L. 90.

The defendant was indicted for high-treason, for "having in his custody and possession one mould, made of lead, on which was impressed the figure of the head-side of a shilling." The statute 8 & 9 Will. 3. c. 25. enacts; "that no smith, founder, engraver, or other person not authorised, &c.) shall, knowingly, make or mend any puncheon, counter-puncheon, matrix, stamp, high trea dye, pattern or mould, of steel, iron, silver, or other metal or metals, or other materials whatsoever, in or on which there shall, or be made or impressed, or which will make or impress the figure, stamp, resemblance, or similitude of both or either of the sides or flats of any gold or silver coin; nor shall, knowingly, make or mend any edger or edging tools, &c. nor any press for coinage, or any cutting engine, &c.; nor shall, knowingly, buy or sell, hide or conceal, or (without lawful authority, &c.) knowingly have in his, her, or their houses, custody, or possession, any such puncheon, counter-puncheon, matrix, stamp, dye, edger, cutting-engine, or other tool or instrument before mentioned, on pain of high-treason." The defendant being found guilty on the trial, the judge respite the judgment till the opinion of the judges should be had on the following points: 1st, Whether the mould found with the prisoner was comprised under the general words of the statute, "other tool or instrument before mentioned," so as to make the custody thereof, without lawful authority or excuse, amount to the crime of high-treason? 2dly, If it be comprised, whether it should not have been laid in the indictment to be a tool or instrument mentioned in that statute? The judges (*absente De Grey, C. J.*) were unanimously of opinion, 1st. That this mould was a tool or instrument mentioned in the former part of the statute; and, therefore, comprised under these general words: and 2dly, That as it was expressly mentioned by name in the

* With a view of rendering this act as effectual as possible, in preserving inviolate to his majesty the right which he possesses with reference to the coin of this realm, the 5th section of this statute enacts, that "if any particular dye, stamp, edger, cutting-engine, press, flask, or other tool, instrument, or engine, used or designed for coining or counterfeiting gold or silver money, or any part of such tool or engine shall be hid, or concealed in any place, or found in the house, custody, or possession of any person not thus employed in the coining of money in some of his majesty's mints, nor having the same by some lawful authority, then any person discovering the same, may seize and carry them forthwith to some justice of the peace of the county or place, to be produced in evidence at the trial of the offender," and further provides, that they shall afterwards be defaced and destroyed by order of the Court; see also 11 Geo. 2, c. 40. s. 3; 37 Geo. 3. c. 126. s. 7; and 43 Geo. 3. c. 139. s. 7.

Or a press* first clause, with respect to the making or mending, it need not be averred to be for coin age, in his possession; incurs the punishment therein awarded.

5. BELL'S CASE. T. T. 1755. K. P. Fost. 430.

In this case the prisoner was indicted for *having in his custody a press for coinage*, without any lawful authority, &c. One of the points reserved was, whether a press for coinage was one of the tools or instruments whithin that clause of the act 8 & 9 W. 3. on which the indictment was founded. A majority of the judges answered the question in the affirmative—

6. BELL'S CASE. T. T. 1755. K. B. 1 East, P. C. 169; Fost. 480.

A doubt was raised as to whether having a tool or instrument *for the purpose of coining foreign gold coin not current here* was within the act 8 & 9 W. 3. A majority of the judges considered that this act was only intended to prevent the counterfeiting the current coin of this kingdom, and not foreign coin; but Lord Rider, C. J., and Mr. J. Foster dissented, considering that the act, though principally levelled against counterfeiters of the current coin of this kingdom, was confined solely to that object; that the intention of the legislature was to keep out of private hands, as far as possible, all means of counterfeiting the coin, and they therefore made it high-treason to be knowingly possessed of such instruments in fact, without lawful authority or sufficient excuse: that it was therefore incumbent on the defendant to show such lawful authority or sufficient excuse; but that, supposing his mere intention to be an ingredient in the case, the intention found of using the tool or instrument in question for the purpose stated, did not amount to a sufficient excuse; and upon the fullest consideration afterwards, Mr. Justice Foster was of opinion that the case did fall within the act, in which opinion it appears Lord Hardwicke fully concurred.

The statute has been, however, in other respects favourably construed; the Court holding that an indictment for having in possession a die made of iron and steel, was well supported by proof of a die made of either material; So it was agreed, that in proceedings upon the act, it was not necessary to prove that money was actually made with the instrument in question.†

7. REX V. OXFORD. E. T. 1819. K. B. 1 Russ. and Ryan's Crown Ca. 382. S. P. REX V. PHILLIPS. M. T. 1818. K. B. Id. 369.

The prisoner was tried and convicted for knowingly having in his possession, contrary to the 8 & 9 W. 3., without lawful authority or sufficient excuse, a die made of iron and steel, upon which was impressed the figure, stamp, resemblance, and similitude of the head-side of a good shilling. Contradictory evidence was given as to the metal of which the dies were composed, viz., whether of iron or steel. The judge told the jury, that if they were satisfied with the rest of the evidence, and were of opinion that the prisoner knowingly had these dies in his possession, and thereon find him guilty, he would reserve the point arising on the indictment. The point being accordingly saved, viz., whether the evidence adduced was sufficient to support the indictment, the judges held that it was, for it was immaterial to the offence of what the die was made, and proof of a die, either of iron or steel, or both, would satisfy the charge.

8. REX V. RIDGELAY. Dec. Sess. 1778. Old Bailey. 1 Leach, C. L. 189; S. C. 1 East, P. C. 171.

The prisoner was indicted under the 8 & 9 W. 3., for that he, knowingly and traitorously, had in his custody and possession one *puncheon* made of iron and steel, in and upon which was made and impressed the figure, resemblance, and similitude of the head-side of a shilling. The third count was the same as the first, only substituting the word guinea for shilling. The second and fourth counts respectively charged that the said puncheon would impress and make the figure, resemblance, and similitude of the head side of a shilling and guinea. In support of this indictment it was proved that the puncheons found in the prisoner's custody were complete, and hardened ready for use, but that it was impossible to say that the shillings found were actually made with those puncheons; that the impressions were too faint to be exactly compared, but that they had the appearance of having been made with the pun-

* So a collar of iron for graining the edges of counterfeiting money is an instrument within the stat., although it is to be used in a coining press; 2 Car. & P. N. P. 235.

† Or if made, that the impression bore an exact resemblance to the original, and proper effigies of the coin; see 1 East, 171.

cheons; that the manner of making these puncheons was as follows: a true shilling was cut away to the outline of the head, which outline was fixed on a piece, as a piece of metal, and was filed close to the outline: this was the puncheon, and the puncheon made the die, which was the counter-puncheon; that a puncheon is complete without letters, but that may be made with letters upon it; though, from the difficulty and inconvenience, it was never so made at the mint, but that, after the die was struck the letters were engraved on it; that a puncheon alone, without the counter-puncheon, would not make the figure; but to make an old shilling, or a base shilling current, nothing more is necessary than these instruments; that they may be used for other purposes, such as making seals, buttons, medals, or other things where such impressions are wanted. Upon this case being referred to the judges, they were unanimously of opinion that this was a puncheon within the meaning of the statute, and said: the word "puncheon" is expressly mentioned in the statute, and will, by the means of the counter-puncheon, or matrix, "make or impress the figure, stamp, resemblance, or similitude, of the current coin;" and these words do not mean an exact figure; but if the instrument impress a resemblance in fact, such as will impose on the world, it is sufficient, whether the letters are apparent or not: otherwise the act would be quite evaded, for the letters would be omitted on purpose. The puncheon in question was one to impress the head of the King of England, and the shillings of his reign, though the letters are worn out, are current coin of the kingdom. The puncheon made an impression like them; and the coin stamped with it would resemble them on the head side, though there were no letters. They compared this case to one mentioned by Sir M. Hale, that the omission or addition of words in the inscription of the true seals, for the purpose of evading the law, would not alter the case. The prisoner accordingly received judgment of high treason.

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9. *REX v. LENNARD*. E. T. 1772. C. P. 1 East, P. C. 170; S. C. 2 Bl. 807; S. C. 1 Leach, C. L. 90.

A point was raised in this case upon the form of an indictment for defendant having a mould for coining in his possession, contrary to the stat. 8 & 9 W. 3. The doubt was, whether the mould which was found in the prisoner's custody, it having only the resemblance of a shilling *inverted*, viz., the convex part of the shilling being concave in the mould, and *vice versa*; the head in profile being turned the contrary way of the coin, and all the letters of the inscription reversed, was not properly an instrument which would make and impress the resemblance, stamp, &c. rather than an instrument on which the same were made and impressed, as laid in the indictment, the statute seeming to distinguish between such as *will make and impress* the similitude, &c., as the matrix, die, and mould, and such on which the same is *made and impressed*, as a puncheon, counter-puncheon, or pattern. But a great majority of the judges were of opinion that this evidence sufficiently maintained the indictment, because the stamp of the current coin was certainly impressed on the mould in order to form the cavities thereof. They agreed, however, that the indictment would have been more accurate had it charged "that he had in his custody a mould that would make and impress the similitude, &c.;" and in this opinion those who otherwise doubted acquiesced.

And they have consequently interpreted in such a manner, as if warranted by the meaning of the act, to convict the prisoner.

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2d. *As to the indictment, and proceedings incident thereto.*

1. *As to the indictment.*

The indictment must follow the words of the act, and negative those exceptions which are introduced into it to exonerate certain parties from any responsibility; see 1 East, P. C. 167. 169; 1 Leach, 90. 189; Foster's C. L. Pref. 3d ed. 8; 1 Burr. 154. It is in no case absolutely necessary to show the day on which the offence was committed, though when the statute is modern it is usual; and in concluding that part of the indictment averring the *scienter*, it is a sufficient averment of knowledge (see 9 Sh. 904) to allege that the defendant "knowingly" &c. committed the act. The word *traitorously* is also material; see 2 Ld. Rd. 870; Comb. 259; 1 East, P. C. 115. The indictment

Indictment

should also always allege the fact to be done against the duty of the defendant's allegiance; Comb. 259; 1 *Id.* Raym. 1 & 2; 2 Salk. 630; 1 East, P. C. 115; 4 Harg. St. Tr. 670. The other rules applicable to such indictments are the same as must be attended to in general cases. For Forms, see Petersdorff's index, Crim. div. tit. Coin.

2. *As to the pleas** See *ante*, vol. ii. p. 737. 745.

3. *As to the evidence.*

The evidence must support the material allegations in the indictment;

1. In support of the indictment it must be proved, according to the offence, that the prisoner made, mended; or had in his possession, or conveyed out of the mint, certain coining instruments, or concealed the same. *Vide ante*, p. 509. It must also be shown that the tools were, in the former instances, meant to be used for coining money of this realm. *Vide ante*, p. 511. But it will not be necessary to establish the exact words of the indictment, describing the instruments; as if they be alleged to be made of iron and steel, proof of their composition of *either* material, it has been seen, would be sufficient; nor is it requisite to establish in evidence that the money was actually made with the instruments in question. *Vide ante*, p. 512.

Any prosecution connected with the first and second sections of the statute of William, noticed in this division, must be commenced within three months, save and excepting those offences which by the 7 Anne (which renders the act of William perpetual) may be commenced within six months after the commission of the offence, viz., making or mending, or beginning or proceeding to make or mend, any coining tool or instrument in the above act prohibited.

[515] It is no objection to evidence on this indictment, that it also goes to show the prisoner guilty of another distinct treason; 2 Carr. & P. N. P. C. 235.

2. *Rex v. PHILLIPS.* M. T. 1810. K. B. Russ. and Ry. Cr. Ca. 369. S. P. WILLACE'S CASE, 1 East, P. C. 186. S. P. BARKER'S CASE. MS. 1 Russel on Crimes, 2d ed. 79.

By clear and positive proof,

The jury, at the trial of the prisoners in this case, found them guilty of knowingly having in their custody instruments of coinage, contrary to the provisions of the 8 & 9 W. 3. c. 36. s. 1. Subsequently it was discovered that the prosecution must be commenced within a certain period limited by the act. The apprehension of the prisoner upon a transaction for high treason respecting the coin was within the time, but the preparation of the indictment and the commission day of the assizes were not so. The arrest of the prisoners at the above time, however, appeared by parol only; the warrant was not produced as proved; nor was the warrant of commitment, or the depositions before the magistrates, given in evidence, to show on what transaction, or for what offence, or at what time, the prisoners were committed. The judges upon this point being reserved, were afterwards of opinion that there was not sufficient evidence that the prisoners were apprehended upon transactions for high treason respecting the coin within three months after the offence committed, and directed application to be made for a pardon.

4. *Of the witnesses.*

Witnesses.

With respect to the witnesses in cases which amount to treason, it appears that there is not the same necessity for two witnesses to prove the treason, as in the higher species of that offence; but the offender may be indicted, tried, convicted, or attainted by such like evidence, and in such manner as felons in general. See 1 East, P. C. 187; Fost. 539; 1 Hale, 221; 1 Russ. on Crimes, &c. 2d edit. 62.

5. *Of the judgment and punishment.*

Judgment and punishment.

In all cases of treason respecting the coin, whether newly created such or not, and so in petty treason, the judgment is to be drawn on a hurdle and

* The defendant must be prepared to clearly establish in evidence either such direct or indirect facts as will tend to exculpate him at once, or at all events show that a doubt may be entertained in the minds of the jury. It is, however, the more advisable, that he should have as plain evidence as possible, not being entitled to a copy of the indictment, witnesses, or jury; 6 Geo. 3. c. 53. s. 13; 4 Bl. Com. 362; nor to make his full defence by counsel; 7 & 8 W. 3. c. 3. s. 13; but being in all cases to be tried as a common felon, except that he is allowed 35 peremptory challenges; 1 East, P. C. 187.

hanged; for that was the judgment before the stat. 25 Ed. 3. st. 5. c. 2. and was not intended to be altered thereby; and these being all offences in *pari materia*, and auxiliary to the original law, have the same judgment; 1 East, P. C. 138. Women were formerly to be burnt; but by 30 Geo. 2. c. 48, they are also to be drawn and hanged. No corruption of blood or loss of dower ensues; Burn, J. tit. Coin.

(D) RELATIVE TO COUNTERFEITING THE COIN.

(a) Of the realm.

1st. *As to the king's money.*

The statute 25 Ed. 3. st. 5. c. 2, declares it to be high treason "if a man counterfeit the king's money. And by the 8 & 9 W. 3. c. 26. s. 3. (made perpetual by 7 Ann. c. 25.) it is enacted, that if any person (not employed in the mint) shall mark on the edges any of the current coin of the kingdom, or if any person whatsoever shall mark on the edges any of the diminished coin of this kingdom, with letters or gravings, or other marks or figures like unto those on the edges of money coined in the mint; he, his counsellors, procurers, aiders, and abettors, shall be guilty of high treason; the prosecution to be commenced within six months.

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The statute 15 Geo. 2. renders the party making of shillings and sixpences to resemble guineas or half guineas, and making halfpence or farthings to resemble shillings or sixpences, if prosecuted within six months, guilty of high treason, provided he do not convict two or more offenders under the act. By the fifth section of this act it is provided, that offenders shall be indicted, arraigned, tried, and convicted, by such like evidence, and in such manner as were then used and allowed against any offenders for counterfeiting the lawful coin.

The stat. 8 & 9 W. 3. c. 26. s. 4. inflicts the same punishment on persons guilty of gilding or silvering coin or blanks, or gilding silver blanks, the prosecution to be in three months.

The statute 56 Geo. 3. c. 68 s. 17. relating to the new silver coinage, enacts, that all and every act in force immediately before the passing of that act, respecting the coin of this realm, and all their provisions, not expressly repealed by that act, and not repugnant or contradictory to the enactments and provisions of that act, shall be and continue in full force and effect, and shall be applied and put in execution with respect to the silver coin to be coined in pursuance of the directions of that act as fully and effectually to all intents and purposes whatsoever, as if the same were repeated and re-enacted in that act.

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2d. *As to the copper coin of this realm.*

By the 15 G. 2. the counterfeiting the copper money of this realm is made a misdemeanor. But by the 11 G. 3. c. 40. s. 1. the offence is created a felony. And the stat. 37 G. 3. c. 126. enacts, that the provisions of those two statutes shall extend "to all such pieces of copper money as shall be coined and issued by order of his Majesty, his heirs, and successors, and as shall by

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* It appears that the coin or money of this kingdom consists properly of gold or silver only, with a certain alloy, constituting what is called *sterling*, coined and issued by the king's authority, and that the statute of Edward the Third (25 Edw. 3. st. 5. c. 2.) in mentioning "the king's money," generally refers to such money which is supposed also to be referred to by any other statute meaning money generally; see 1 East, P. C. 149; 1 Hale, ch. 17, 18, 18, and 20. It may be here observed, that some verbal difference is perceptible in the wording of several of the statutes on the subject of the coin since the revolution. The statute 8 & 9 W. 3. c. 26. speaks of the gold and silver coin of "this kingdom," or "current within this kingdom." The statute 15 Geo. 2. c. 20. in one part expresses by name "guineas and half guineas," and "shillings and sixpences," and is consequently confined to those identical coins. In another part it speaks of counterfeit money generally. The statute 11 Geo. 3. c. 40. as to the copper coin, and the statute 37 Geo. 3. c. 26. s. 2. as to gold and silver coin, describe each as "the coin of this realm," following the words of the more ancient statutes. No stress can be laid upon such verbal differences between statutes passed in *pari materia*; the construction, which the reason of the thing points out, must be such as the words are capable of receiving, without violence to their proper or accepted legal signification; see 1 East, P. C. 157; 1 Russel on Crimes and Misdemeanours, 2d edit. p. 54.

his or their royal proclamation, be ordered to be deemed and taken as current money of the realm," in the same manner as if such pieces had been publicly made and described in such acts respectively.

(b) *Of other countries.*

Provisions have been also made by the government as to the counterfeiting of foreign money.

Counterfeiting gold and silver foreign coin, as is current here is high treason; see 4 H. 7. c. 18; 1 Mar. st. 2. c. 6. Counterfeiting such as is not current here, only formerly amounted to misprision of treason; see 14 Eliz. c. 3; but has been since rendered a felonious act by the 37 G. 3. c. 126. And by the 43 Geo. 3. c. 139. s. 3. counterfeiting foreign coin of copper, or of other metal of less value than silver, not current here, subjects the individual to an indictment for a misdemeanor; and by the 6th section, penalties are imposed on parties having more than five pieces of such counterfeit foreign coins in their possession. The act further provides, that persons against whom any bill of indictment shall be found, shall not be entitled to traverse the same to any subsequent assizes or sessions; but shall be tried upon the bill being found, unless there shall be good cause why the trial should be postponed. And a provision is also made for the certificate of a former conviction being sufficient evidence of that fact in cases where persons are tried for such offences.

(c) *As to what will constitute the offence.*

It is clearly a counterfeiting with in the statutes, when the counterfeit money is made to resemble coin, the impression on which has been worn away by time.*

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1. *THE KING v. WILSON.* October Sessions, 1783. Old Bailey. 1 Leach. 285. *S. P. REX v. WELSH.* 1785. 1 Leach, C. L. 364; 1 East, P. C. 164.

One Wilson was indicted for counterfeiting a piece of money like the good, legal, and current coin of the realm called a shilling. The shillings produced in evidence were quite smooth, having no appearance of either head or tail, and resembling those in circulation in nothing but colour, size and shape. It was objected for the prisoner, that this evidence did not support the indictment for counterfeiting to the likeness of the good and legal coin of the realm, because the smooth shillings, to resemble which these blanks were made, were not themselves like the real coin of the realm. *Per Cur.* A smooth blank made reasonably like the legal coin, which though worn smooth by time, is yet suffered to remain in circulation, may be sufficiently to the likeness of the current coin of the realm to bring the counterfeiter, within the statute. See *Rex v. J. & P. Welsh*, Hertford Lent Assizes, 1 Leach, 364; *Varley's case*, 1 Leach, 74; the case of *Harris and Minion*, 1 Leach, 135.

2. *REX v. HARRIS AND MINION.* Old Bailey. 1775. 1 Leach, C. L. 135.

But to support an indictment for counterfeiting money, it must be proved that it was in a passable state;

On an indictment for high treason on 25 Ed. 3. c. 2. and 8 & 9 W. 3. c. 26. s. 4. for coining to the similitude of the legal money, it appeared that at the time the prisoners were apprehended, M. was sitting by the fire; Harris had a pair of scissors and some metal in his hand, which he was clipping into slips of more than one inch broad. There was a crucible on the fire, and metal melting in it, a pair of scales, and weights, with some good silver lying on them. In a box with the lid open were the flasks and moulds, and several pieces of base metal, which appeared to have been cast in the moulds, for the impression upon some of them exactly resembled that on one of the good shillings, which was lying near them. In these pieces of base metal there is a small mixture of good silver, which, by heating them, and then immersing them in *aqua fortis* and water, is drawn out upon the surface of the metal. But no one piece of base metal was found in such a state as to make it passable. The prisoner

* And as a general rule it may be stated, that the monies charged to be counterfeited must resemble the true and lawful coin; 1 Hawk. P. C. c. 17. s. 81; but this resemblance is a matter of fact of which the jury are to judge upon the evidence before them; the rule being that the resemblance need not be perfect, but such as may in circulation ordinarily impose upon the world; 1 Hale, 178. 184. 211. 215. Thus a counterfeiting, with some little variation in the inscription, effigies, or arms, done probably with intent to evade the law, is yet within it; and so is the counterfeiting in a different metal, if in appearance it be made to resemble the true coin; 1 East, P. C. 164; see 1 Burn's J. 532. 23d edit.; and 1 Russel on Crimes, 58. 2d edit. And it may be here also observed, that if there be a counterfeiting in fraud of the king, the offence within the respective statutes is complete, before any uttering or attempt to utter; 3 Inst. 61; 1 Hale, 215. 228; 1 Hawk. c. 17. s. 85; 1 East, P. C. 165; and see 1 Russel. 61, 2d edit.

being found guilty contrary to the opinion of the judge, the judgment was reversed; and the judges afterwards held the case under these circumstances not within the statute.

S. *REX V. VARLEY*. E. T. 1770. K. B. 2 Blac. 682; S. C. 1 Leach, C. L. 76.

The prisoner being guilty of having forged the impression of a half guinea on a piece of gold, which was previously hammered, but was not round, nor would pass in the condition it then was; a reference was made to the judges for their opinion, whether he was liable by law to be convicted; when they gave it as their opinion that the crime of counterfeiting was incomplete.

4. *REX V. LAVEY*. Dec. Sess. 1776. Old Bailey. 1 Leach, C. L. 153; S. C. 1 East, P. C. 166.

In this case it was made a question what amounted to a colouring within the statute 8 & 9 W. 3. c. 26. s. 4. On an indictment upon the act, the jury found the prisoner guilty upon very clear and satisfactory evidence; but it appeared that the colour of silver was produced by melting a small portion of good silver with a large portion of base metal, and throwing it after it had been cast into round blanks into *aqua fortis*, which has the effect of drawing to the surface whatever silver there may be in the composition, and giving the metal the colour and appearance of real silver. A doubt, therefore, arose, whether this process of extricating the latent silver by the power of the wash from the body to the surface of the blank, was colouring with "a wash and materials," within the meaning of the statute; or whether the legislature did not intend such a colouring only as is produced by some external application on the surface of the blank. But the judges thought that this process of extricating the latent silver from the body to the surface of the base metal by the power of *aqua fortis*, was a colouring within the words of the statute, and they also thought that it might be charged as a colouring with silver, for the effect of the *aqua fortis* is to corrode the base metal and leave the silver only on the superficies, and so the copper is covered or cased with silver.

the legislature, has, however, always predominated over mere technical objections; and it has consequently been holden, that separating silver from the body of base metal by means of *aqua fortis* is a coloring.

5. *REX V. CASE*. Spr. Ass. 1795. Lancaster. 1 Leach, C. L. 154; S. C. 1 East, P. C. 165.

On a case reserved for the opinion of the judges it appeared that the prisoner was apprehended in the very act of steeping round blanks, composed of brass and silver, in *aqua fortis*; none of them were in a finished state, but many were taken out of the liquor, and others were found dry. These blanks exhibited the appearance of lead, and some of them had the impression of a shilling; and by rubbing them they would be made perfectly to resemble silver coin, but in their then state the jury found that none of them would pass current. The question was, whether the offence was completed, inasmuch as the colour of silver had not been produced on any of the blanks. The counsel for the crown contended that the offence was complete by dipping the round blanks in the *aqua fortis*, by which some change of colour had been produced; for that the words "producing the colour of silver" were to be restrained to the next antecedent words "materials," &c. and not the preceding words "colour," &c. But one of the judges said he understood the words "colour," &c. to mean producing on the piece of metal the colour of silver, which was not done here, for, without rubbing, the money coined could not pass. And another of the judges observed, that the word in the statute was "producing," in the present tense, and not materials which would produce. But all the other judges thought the conviction right; they considered that the offence was complete when the piece was coloured, for it was then covered with materials which produce the colour of silver, and that it was not necessary that the piece so coloured should be current, for the colouring of blanks was an offence within the clause.

(d) *As to the parties by whom the offence may be committed.*

With respect to the offence of counterfeiting the coin in general, it may be

The offence of counterfeiting may be committed by officers in the mint.* observed, that not only all such as counterfeit the king's coin without his authority, but even such as are employed by him in the mint, come within the statutes, if for their own lucre they make the money of base metal or alloy, or lighter than by their indentures they are authorized and bound to do; for they can only justify their coining at all under such an authority; and if they have not pursued that authority, it is the same as if they had none. But it is not any mistake in weight, or alloy, that will make them guilty of high treason; the act must be wilful, corrupt, and fraudulent, for it must be laid and proved to be done traitorously; see 1 East, P. C. 166; 1 Hale, 213; 1 Hawk. P. C. c. 17. s. 55; 3 Inst. 16, 17; 4 Bl. Com. 84.

(c) *As to the indictment and proceedings incident thereto.*

1st. *With reference to the king's money.*

1. *As to the indictment.*

Indictment.

Some rules applicable to the framing of the indictments are to be found in a preceding part of this work; *vide ante*, p. 514. Where defendants are taken in the act of incomplete coining, an indictment, containing one count on 25 Ed. 3. c. 2., and another on 8 & 9 W. 3. c. 26 cannot be supported; Leach, C. L. 135. Where the indictment is laid for coining, clipping, uttering, &c. it must show the *kind* of coin in respect whereof the offence is committed; but though it is usual to express the numbers of each kind, it is not necessary to set this forth in the indictment; 2 Hale, 187; Cro. C. C. 39. When the indictment is to be drawn for treason in colouring base metal like a shilling, contrary to the enactments of the 8 & 9 W. c. 26. s. 24. the language of the act must be strictly pursued. For Forms, see Petersdoff's Index, Crim. div. tit. "Coin."

2. *As to the pleas.* *Vide ante*, vol. 2, p. 737.—745.

3 *As to the evidence.*

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The evidence to support the indictment must show the counterfeiting of coin by the defendant in such a particular mode, as to leave no doubt on the minds of the jury of the prisoner's criminality,

1. It has been already seen *ante*, p. 510) that the legislature by the enactments contained in the 8 & 9 W. 3. c. 26. s. 5. have made special provision for securing the tools of the offenders against the statutes passed for the protection of the coins, in order that they may be produced in evidence, and afterwards be disposed of in a proper manner. Provisions of a similar kind are made with respect to searching for counterfeit or diminished money, either of this or foreign countries, and afterwards destroying it, and then delivering it to the persons to whom the same of right shall appertain; see 8 & 9 W. 3. c. 26. s. 5; 11 Geo. 2. c. 40. s. 3; 37 Geo. 3. c. 12, s. 17; and 43 Geo. 3. c. 139 s. 7.

To prove the allegation that the coin specified was of the *current* coin of the realm, it is not in general necessary to prove either the indenture between the king and master of the mint, or the king's proclamation to give it *current*.

* There appears, says Mr. Russel, in his *Treatise on Crimes*, p. 61. 2d ed. to have been a difference of opinion with respect to *receivers* of such as counterfeit money, whether they are guilty of more than misprison of treason; Lord Hale says, that though the more probable opinion may be that such receivers are traitors, yet the more merciful opinion is against such a construction; 1 Hale, 287; and a case appears to have been ruled upon this milder ground; Corrier's case, Dy. 296. a. But the case did not pass without doubt, and the more strict construction is stated to have been adopted by the best modern authorities, in which it was considered to result necessarily from the general rule of law, that whatever will make a man accessory before or after in felony will make him a principal in treason; and that the stat. 25. Ed. 3. having directed these offences to be high treason, the consequence follows of course; 1 East, P. C. 95. With respect to the light in which accomplices or receivers are considered in those offences concerning the coin which amount only to felony, it is settled that they follow the general rule applicable to felony. Two agree to counterfeit, and one does it in consequence of that agreement; they are both guilty. One counterfeits; and another, by agreement beforehand, puts it off; the latter is a principal; so if he put it off afterwards, knowing that the other coined it, for that makes him an aider; so if he furnish the coiner with tools or materials for coining; 1 East, P. C. 186.

Procurers, who are named, in the statutes 1 Mary, st. 2. c. 6. and 14 Eliz. c. 8. are not mentioned in the statutes 27 G. 3. c. 126; but the offence being made felony, all the incidents of felony at common law are attached to it, and consequently these may be accessories. But it is a question if they are liable to transportation or to any other punishment than is authorized by the general act of 18 Eliz. c. 7. s. 3; 1 East, P. C. 161.

cy; for the fact that the money is the king's money, and current within the realm, is one of general notoriety, and may be founded, it seems, on evidence of common usage; see 1 Hale, 192. 197. 213; East, P. C. 149. When however, a new species of coin has lately been issued with a new impression, which is not familiar to the people, it might be advisable to give more precise evidence of the fact by means of the indentures, or by the testimony of an officer of the mint cognisant of the new coin, and of the stamp used, or by similar evidence; East, P. C. 149. And when by any statute, such as the statute 37 G. 3. c. 126. relating to a new coinage, the king's proclamation is essential, it ought to be proved; *id.* And coin once legally made and issued by the king's authority, continues to be the current coin of the country until it be recalled, notwithstanding any change in the authority by which it was so constituted; 1 Hale, 122; East's P. C. 148. A recall is proved by proclamation, or by an act of parliament enacting it; and it seems, that long disuse is presumptive evidence of a recall; East, P. C. 149. And on the other hand, where a proclamation is essential, long continued and approved usage of the coin would be evidence of a legal commencement by proclamation; see East, P. C. 149. 150.

It is rarely the case that the counterfeiting can be proved directly by positive evidence; it is usually made out by circumstantial evidence, such as finding the necessary coining tools in the defendant's house, together with the pieces of the counterfeit money in a finished or in an unfinished state, or such other circumstances as may fairly warrant the jury in presuming that the defendant either counterfeited, or caused to be counterfeited, or was present aiding and assisting in counterfeiting the coin in question; or if several conspire to counterfeit the king's coin, and one of them actually do so in pursuance of their conspiring, it is treason in all, and they may be indicted for counterfeiting the king's coin generally; 1 Hale, 214. And the counterfeit coin produced in evidence, it has been seen, must appear to have that degree of resemblance to the real coin, that it would be likely to be received as the coin for which it was intended to pass, by persons using the caution customary in taking money; *vide ante*, p. 518. It is not however necessary to prove that the counterfeit coin was uttered or attempted to be uttered; see 1 Hale, 215. 129; 3 Inst. 16. The plaintiff must also be prepared with evidence, showing the due commencement of the prosecution.

2. *Rex v. Isaacs*. H. T. 1813. MS. Bayly, J. cited 1 Russ. on Crimes, 62. 2d ed.

Two women were indicted for colouring a shilling and sixpence, and a man (Isaacs) as counselling, procuring, aiding, and abetting the coining. The evidence against him was, that he visited them once or twice a week; that the rattling of copper money was heard whilst he was with them; that once he was counting something just after he came out; that on going to the room, just after the apprehension, he resisted being stopped, and jumped over a wall to escape; and there were then found upon him a bad three-shilling piece, five bad shillings, and five bad sixpences; but upon a case reserved the judges thought the evidence too slight to convict him. The defendant, amongst other exculpatory evidence, may show that he has exempted himself from the effect of the enactments of the legislature by having in some instances prosecuted others to conviction; or may resort to such means as have been already pointed out; *vide ante*, p. 514.

4. *As to the witnesses.* *Vide ante*, p. 515.

5. *As to the judgment and punishment.* *Vide ante*, p. 515.

6. *As to the prosecutor's rewards.*

By the 6 & 7 W. 3. c. 17. s. 9. a party prosecuting to conviction a clipper &c. of coin, receives 40l.; and by the 15 G. 2. c. 28. s. 7. the same sum for him convicting a traitor of washing, gilding, &c.

2d. *With reference to the copper coin of this realm.*

1. *As to the indictment.*

The indictment, when framed on the stats 11 G. 3. c. 40. s. 1. should con-

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For where upon the trial of a prisoner for counselling others, in counterfeiting money, it was proved that he had bad coin upon him when he was arrested, the fact was considered too slight to convict him although his having been frequently in the company of coiners, and his attempting to escape when apprehended, were bro't home to

tain two counts; the first framed on the words of the act, and the second not adhering so strictly to the mode in which the counterfeit money is designated, but calling it a *piece of money coined*, instead of a *piece of the copper money of the realm*, as it is in the statute: *Et vide ante*, p. 514.

2. *As to the pleas.* *Vide ante*, vol. 2, p. 737 & 745.

3. *As to the evidence.*

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Evidence.

Prove the counterfeiting as *ante*, p. 521. The above statute 11 G. 3. extends only to halfpence and farthings; but it has since been extended by stat. 37 G. 3. c. 126. to all such copper money as shall be coined and issued by order of his Majesty, and as shall by his royal proclamation be ordered to be deemed and taken as current coin of this realm. So that upon an indictment for counterfeiting any other piece of copper money but a halfpenny or farthing, it seems necessary that the proclamation should be produced in evidence. Proof should be adduced of the due commencement of the prosecution.

4. *As to the judgment and punishment.*

Judgment
and punish-
ment.

The offence of counterfeiting the copper money of this realm is a misdemeanor under the 15 Geo. 2. c. 28. and punishable with imprisonment for two years; but amounts to felony within clergy when the crime comes within the enactments of the 11 G. 3. c. 43. s. 1. It is stated as a question, whether, under the statute of 37 G. 3. it is not optional to prosecute either for a misdemeanor, as the offence is made by the statute 15 G. 2., or for a felony, as it is made by that of the 11 G. 3; since the provisions of both statutes are extended to any new copper coinage. But yet it is observed that such an option, without varying circumstances, is unusual and incongruous with the general law that the misdemeanor is merged in the felony. The punishment is only a year's imprisonment, which punishment is founded on the general statute of the 18 Eliz. c. 7. s. 3; see 1 East, P. C. 162.; and see the form of judgment on the allowance of clergy for the single felony, Cro. Car. 123. 6.

3d. *With reference to foreign coin.* *Vide ante*, p. 517. 520. & 523.

(E) RELATIVE TO IMPAIRING THE COIN.

(a) *As to what constitutes the offence.*

Impairing
coin.

By the statute 5 Eliz. c. 11. s. 2. *clipping, washing, rounding, or filing*, or by the 18 Eliz. c. 1. *impairing, diminishing, falsifying, scaling, or lightening*, the coin of this realm, or the diminution thereof, or of any other realm current here, *for wicked lucre or gain's sake*, shall be deemed treason. The new silver coinage act directs that all acts in force immediately before the passing of that act, respecting the coin of *this realm, or the clipping, diminishing, or counterfeiting*, the same, &c. shall remain in force, unless expressly repealed, or repugnant to its provisions. The impairing of Irish coin, though not current in England, is, it will be observed, within the express words of the above act; 1 East, P. C. 174; 1 Hale, 221. 222.*

(b) *As to the parties by whom the offence may be committed.*

Vide ante, p. 519.

(c) *As to the indictment, and proceedings incident thereto.*

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1st. *As to the indictment.*

The object of the prisoner in committing the crime with which he is charged must be clearly developed in the indictment, and the words of the act, "that it was for wicked lucre or gain's sake," are material. In other respects the indictment will be guided by the same general rules as in other cases; *vide ante*, p. 514.

* With a view of more effectually preventing the clipping diminishing, or impairing the current coin of the kingdom, the statute 6 & 7 W. 3. c. 17. s. 4. imposes certain penalties, and awards a certain punishment to those who buy or sell and (see a qu. in East, P. C. 174) knowingly have in their custody or possession any clippings or filings of the current coin of this kingdom. The 8th section of this statute makes provision for breaking open houses and searching for bullion, and the persons in whose possession bullion is found, not proving it to be lawful silver, and that the same was not before the melting thereof coin nor clippings, shall be committed to prison to take their trial. Provisions against melting down any gold or silver sufficient to run in payment are made by other statutes; see 17 Ed. 4. c. 1; and 13 & 14 Car. 2. c. 31. And if money, false or clipped, be found in the hands of any that is suspicious, he may be imprisoned till he hath found his warrant *per statutum de moneta*; 3 Inst. 18.

2d. *As to the pleas.* *Vide ante*, vol. ii. p. 737 & 745.

3d. *As to the evidence.*

The proof must correspond with the terms of the indictment, so as to establish a case within the acts. In other respects the evidence is as in other cases; *vide ante*, p. 520. In some instances it may be necessary to prove the king's proclamation; *vide ante*, p. 523.

4th. *As to the witnesses.*

It was agreed by all the judges that one witness was sufficient in clipping as well as counterfeiting the coin, though it appeared that the opinion and practice had once been otherwise in the case of clipping; 1 East, P. C. 127.

5th. *As to the judgment and punishment.*

The judgment and punishment are the same as in other cases of high treason; *vide ante*, p. 515.

(F) AS TO THE IMPORTATION OR EXPORTATION OF COUNTERFEIT OR LIGHT MONEY.

(a) *With reference to the importation of such money.*

Importing counterfeit money of England, knowing the money to be false, to merchandize, &c., amounts to the crime of high treason; 25 Ed. 3. st. 5. c. 2. So knowingly importing any false or counterfeit foreign coin or money current within this realm, to the intent to utter or make payment with the same here, &c.; 1 & 2 Ph. & M. c. 11;* or importing false and counterfeit foreign gold or silver coin, not current here, to the intent to utter the same (37 Geo. 3. c. 126) is in the former instance created treason, and in the latter made a felony.† Considerable quantities of old silver coin of the realm, or coin purporting to be such, below the standard of the mint in weight, were formerly imported, to the public detriment at that time, which caused the passing of the 14 Geo. 3. c. 42. This act was revived and made perpetual by the 39 Geo. 3. c. 75; but the recent act 56 Geo. 3. c. 68. s. 2. enacts, that so much of the 14 Geo. 3. c. 42. as declares that any silver coin of the realm less in weight than after the rate of 62s. for every pound troy, shall be forfeited, and of any act or acts for reviving, or continuing, or making perpetual, the provisions of the said act, in this respect, shall, before the passing of that act, be repealed.

Or the importation of counterfeit, or light counterfeit money.

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(b) *With reference to the exportation of counterfeit money.*

The statute 38 Geo. 3. c. 67. s. 1. prohibits the sending counterfeit coin, either of this kingdom or of any other country, out of the kingdom, for the pur-

Exportation of counterfeit money.

* The words "current within this realm" refer to gold and silver coin of foreign realms current here by the assurance and consent of the crown, which must be by proclamation, or by writ under the great seal. And the money, the bringing in of which is prohibited by these statutes, must be brought from a foreign nation; and not from Ireland, or other place subject to the crown of England, because the counterfeiting them is punishable by the laws of our king as much as in England; see 1 Burn's J. 534; 1 Hawk. c. 17. s. 67; 1 East, P. C. c. 4. s. 1. 4. 5. 6. 21. 22. It may be observed also, that these acts are confined to the importer, and do not extend to a receiver, at second hand; and such importer must also be averred and proved to have known that the money was counterfeited; 1 Hale, 227. 228. 317; 1 Hawk. c. 17. s. 86. 88; 1 East, P. C. 175. It seems to be the better opinion, that it is not necessary that such false money be actually paid money, or merchandized with, for the words of the statute 25 Ed. 3. are "to merchandize or make payment, &c." which only import an intention to do so, and are fully satisfied whether the act intended be performed or not; 1 Hawk. c. 17. s. 89. But Lord Coke and Lord Hale seem to have thought differently; 3 Inst. 18; 3 Hale, 219; *sed vide* 1 East, P. C. 175-6; where it is said that though the best trial and proof of an intent be by the act done, yet it may be also evinced by a variety of circumstances, of which the jury are to judge. At any rate, such intent must be averred in the indictment; and it is clear, that bringing over money counterfeited according to the similitude of foreign coin, is treason within 1 & 2 Ph. & M. c. 11; 1 Hawk. c. 17. s. 89; see 1 Russel on Crimes, &c. 2d edit. 66.

† Accessories before are not mentioned in this statute. There may, however, be such accessories, as they are incident to every felony; but it is doubted whether they are liable to the punishment awarded by the act; see 1 East, P. C. 176; and Russel on Crimes, 2d ed. 67. From the words of the statute, an importation with intent to utter is clearly sufficient without any actually uttering; see 1 East, P. C. 176. It seems that this statute does not provide for the case of a person collecting the base money therein mentioned from the vendors of it in this country, with intent to utter it within the realm, or the dominions of the realm; 1 East, P. C. 177; and see 1 Russel on Crimes, 2d edit. 17.

pose of its being imported into the British colonies in America; or the West Indies.

(G, RELATIVE TO RECEIVING, UTTERING, OR TENDERING COUNTERFEIT COIN.*

(a. *'If the realm.*

1st. *As to receiving, paying, or putting off, &c.*

1. *The king's money.*

(a 1) *As to what constitutes the offence.*

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In order to constitute the offence of putting off, &c. counterfeit money according to the 8 & 9 W. 3. It is essential that there be an actual passing or getting rid of the money.

1. The statute 8 & 9 W. 3, c. 26., made perpetual by 7 Anne, c. 25. s. 3. enacts, that if any person shall *take, receive, pay, or put off*, any counterfeit milled money, or any milled money whatever, unlawfully diminished, and *not* cut in pieces, at or for a lower rate or value than the same by its denomination doth or shall import, or was coined or counterfeited for, he shall be guilty of felony. The 7th section saves the corruption of blood; and by section 9 no prosecution is to be made for any offence against this act unless it be commenced within three months after the offence committed.

2. THE KING v. WOOLDRIDGE Feb. Sess. 1784. Old Bailey. 1 Leach, C. L. 307; S. C. 1 East, P. C. 179.

The prisoner was indicted on the 8 & 9 Will. 3. c. 26. s. 6. which enacts, that whoever shall pay or put off any counterfeit milled money at or for a lower value than the same. by its denomination, doth imply, import, or was counterfeited for, shall be guilty of felony. The prisoner agreed with one Levy to pay and put off to her a certain quantity of counterfeit milled money at a lower rate than the same was coined for, and which she agreed to receive. Levy was admitted as evidence for the crown, as it appeared that in pursuance of this agreement the prisoner laid before witness a number of counterfeit shillings, but that whilst witness was counting them, and before she had paid for them, the officers of justice came in. It was contended for the prisoner, that the contract to *put off*, on the one hand, and to *take*, on the other, not having been completed, it was not a *putting off* within the meaning of the act. For the crown it was said, that the prisoner having *sold* and given possession, it was on his part a completion of the contract, for that he had done all in his power in paying and putting off.

Per Cur. It is perfectly clear that the offence charged in this indictment must be measured by the words of the statute on which it is brought; and however far the prisoner may have gone in putting off the counterfeit money, if the act of *putting off* is not finally completed, it does not amount to the crime expressed; and by the detection in this case the offence was rendered incomplete.—Prisoner acquitted. See King v. Varley, 2 Black. Rep. 682; 1 Leach. C. L. 76.

3. REX v. BUNNING. Sept. Sess. 1791. Old Bailey. 2 Leach. C. L. 621; S. C. 1 East. P. C. 180. S. P. DORRINGTON'S CASE. MS. 1 Russ. 2d edit. 80. n. S. P. JACOB AND LAZARUS'S CASE. Ibid.

The prisoner was indicted for putting off to one J. P. nine pieces of false and counterfeit milled money and coin, each counterfeited to the likeness of a piece of legal and current milled money and silver coin of the realm, called a shilling, at a lower rate and value than the same did by denomination import. The fact of knowingly putting off the shillings at a lower value than according to their denomination was fully proved; but there was no appearance of milling on them, and it was proved by officers from the mint that this money had nev-

* In some cases, the putting off counterfeit money may amount to treason; as if A. counterfeited the gold or silver coin current, and by agreement before that counterfeiting. B. is to take off and vend the counterfeit money, B. is an aider and abettor to such counterfeiting, and consequently a principal traitor within the law; 1 Hale. 214. And in the case of the copper, B. acting a similar part, will be an accessory before the fact to the felony within the stat. 11 Geo. 3. c. 40; 1 East, P. C. 278. And if B. knowing that A. hath counterfeited money, put off this false money for him after the fact, without any such agreement precedent to the counterfeiting, he seems to be as a receiver of A., because he maintains him. And if B. know that A. counterfeited the money conceal his knowledge, though he neither receive, maintain, nor abet A., he will be guilty of misprison of treason; 1 Hale, 214

It is unnecessary however that the counterfeit money be milled, if it resemble the money, which is genuine, would have been milled.

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er been milled, nor any attempt made to counterfeit on them the milling, which is always put on the shilling coined at the tower. Upon this the prisoner's counsel contended, that the evidence did not prove the offence, as described in the indictment, or charged in the indictment, but directly the contrary, as it proved that the money illegally put off was not milled. The case was reserved for the opinion of the judges, who were of opinion that the expression milled money could not have any reference whatever to the edging which it put on real and lawful coin, and which is properly termed graining. That the money coined at the mint is milled money before it is edged, that is before those marks which had been falsely imagined to constitute milled money are put upon it, for all current money passed through a mill or press, to make the plate out of which it is cut of a proper thickness; and that from this process it receives the denomination of milled money, and not, as generally, but erroneously, imagined, from the grainings on its edges. The judges, therefore, thought it unnecessary that the counterfeit money should appear to have been milled, for considering milled money as one word (as if written with a hyphen) and descriptive of the money now current, if the counterfeit resemble the money which, if genuine, would have been milled, it is enough.

(b 1) *As to the parties by whom the offence may be committed.*

Vide ante, p. 519.

(c 1) *As to the indictment, and proceedings incident thereto.*

(a 2) *As to the indictment.**

1. *TOOKE v. HOLLINGWORTH.* E. T. 1793. K. B. 5 T. R. 217.

An agreement had been entered into by B., a trader residing in London, to purchase of C., his correspondent at Manchester, all the light gold which should be sent by the latter from Manchester, to London, and to accept bills at two months for the money due upon the sale, and to accept from time to time other bills drawn by C. for his own convenience; but that, in such case, C. should remit value to the amount of such acceptances to answer, together with the light gold, for the different bills so drawn. B. became a bankrupt, and in an action by his assignees for some of his bills, and gold, after the second argument, the Court desired the counsel to consider whether this contract was illegal by 8 & 9 W. 3. c. 26. s. 6. which makes it felony to buy or sell any malleable composition or mixture of metals or minerals which are heavier than silver, and look, and touch, and wear like standard gold, but manifestly worse than standard; or to take, receive, pay, or put off, any counterfeit milled money, or any milled money, unlawfully diminished and not cut in pieces at or for a lower rate or value than the same by its denomination imports, &c. On the third argument it was insisted by the plaintiff's counsel, that this case did not come within that act of parliament, because it was not stated in the verdict that this coin was unlawfully diminished, which was of the essence of the offence, and that the legislature, in a subsequent statute, 13 Geo. 3. c. 71. considered that the coin might be diminished by reasonable wearing; the Court thought this a decisive answer.

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An indictment for putting off diminished coin at a lower rate, most aver that it was unlawful to diminish ed.

2. *REX v. PALMER.* Dec. Sess. 1773. K. B. 1 Leach. C. L. 102.

The prisoner was indicted in this case on the 8 & 9 W. 3. c. 26. s. 6. for putting off bad money. It was not, however, in accordance with the letter of the act, stated in any of the counts that the counterfeit money was not cut in pieces. The validity of the indictment was, on that ground, called in question, and the Court was clearly of opinion that the indictment was bad, for the words "not cut in pieces" was a material part of the description of the offence.

And it has been held, that an indictment upon this statute was bad for the omitting to state that the counterfeit money was not cut in pieces.

(b 2) *As to the pleas.* *Vide ante*, vol. 2. p. 735. and 745.

* It is necessary, in order to bring a case within this statute, that the money be vented in at a lower value than the coin imports, and that it should be so stated in the indictment; 1 East, P. C. 180. And if the names of the persons to whom the money was put off can be ascertained, they ought to be mentioned and laid severally in the indictment; but if they cannot be ascertained, it must be averred that the money was put off, &c. "to a certain person to the jurors unknown;" 1 East, P. C. 180. As to the general rules, see p. 514.

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Evidence.

(c 2) *As to the evidence.*

The facts which, it has been shown in the above cases, it is material to aver in the indictment, must be of course substantiated by the evidence. It must be proved that the defendant paid or put off one or more of the pieces of counterfeit money in question (a variance between the indictment and evidence in the mention of which is immaterial); and it must have been parted with, and not merely uttered or tendered, but *actually* put off, and that at a lower rate and value than the counterfeit money imported and was coined for. Also it must be proved that the prosecution was commenced within three months after the commission of the offence. It is no objection to evidence in support of an indictment in this case, that it sufficiently establishes another distinct felony; 2 Carr & P. N. P. C. 235.

(d 2) *As to the judgment and punishment.*

Judgment
and punish-
ment.

The crime amounts to the degree of felony, within clergy. The punishment, on allowance of clergy, was burning in the hand and imprisonment not exceeding a year, before the adoption of the former punishment. At the present day it stands on the same footing as other clergyable felonies. A moderate fine or whipping, at the discretion of the court, may be imposed by 19 G. 3. c. 74. s. 3.; continued and made perpetual by 35 Geo. 3. c. 46., and see 1 G. 4. c. 57. prohibiting the whipping of women, and creating the punishment of imprisonment in lieu thereof.

2. *The copper coin of this realm.*

(a 1) *As to what constitutes the offence.*

Receiving
paying, or
putting off
counterfeit
copper coin
of this
realm.

It is enacted by the 11 G. 3. c. 40. s. 2. that if any person shall buy, sell, take, receive, pay, or put off any counterfeit copper coin not melted down or cut to peaces, at or for a lower rate or value than the same by its denomination imports or was counterfeited for, he shall be adjudged guilty of felony.

(b 1) *As to the parties by whom the offence may be committed.*

Vide ante, p. 519.

(c 1) *As to the indictment and proceedings incident thereto.*

(a 2) *As to the indictment.*

Indictment.

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The statute 8 & 9 W. 3. relating only to the putting off counterfeit money at a lower rate or value than that imported by its denomination, the offence of uttering such money in the course of traffic was punishable only as a misdemeanour; till, from its becoming very frequent it was thought proper to subject it to more severe punishment.

The indictment is the same as in the last division, except that instead of *milled money* you insert *copper money*; for "not being cut in pieces," insert "not being melted down or cut in pieces;" and for the words "pay and put off" insert "sell, pay, and put off;" together with such little variations as the difference or denomination of the coins may render necessary.

(b 2) *As to the pleas.* *Vide ante*, vol. 2. p. 735. 745.

(c 2) *As to the evidence.*

As to the evidence to support the above indictment, see ante, p. 529.

(d 2) *As to the judgment and punishment.* *Vide ante*, p. 529.

2d. *As to uttering or tendering counterfeit money in payment.*

1. *Of this realm.*

(a 1) *As to what constitutes the offence.*

1. *REX V. PARKER*, Sum. Ass- 1750. 1 Leach, C. L. 41.

On a case reserved the question was, whether the having possession of one counterfeit half-crown, two counterfeit shillings, and 12 counterfeit sixpences, made of base metal to the likeness of such money, knowing the same to be counterfeit money, with intention to pay away the same as true and lawful money, was an indictable offence at common law, no notice being taken of any such case in 15 Geo. 2. c. 28. But it does not appear that any opinion was ever given, and the prisoner was after some lapse of time discharged, upon entering into recognizance to appear at the then next assizes.*

* In the marginal note to the above case it is however stated, that having the possession of counterfeit money, with the intention of paying it away as for good money, is an indictable offence. The judges have, however, decided in contrariety to such an opinion; see Russ. and Ry. 184. 288; but the having a large quantity of counterfeit coin in possession under suspicious circumstances and unaccounted for, appears to have been considered as evidence of having procured it with intent to utter it as good, which is clearly a criminal act, punishable as a misdemeanour. Thus, upon an indictment for procuring counterfeit shillings with intent to utter them as good, the evidence was, that two parcels were found

The statute 15 Geo. 2. c. 28. s. 2 enacts, "that if any person shall utter or tender in payment any false or counterfeit money, knowing the same to be false or counterfeit, to any person or persons," and shall be thereof convicted, he shall suffer six months' imprisonment, and find sureties for good behaviour for six months further, and on conviction for a second offence shall suffer two years' imprisonment, and find sureties in two years more; and on conviction for a third offence shall be adjudged guilty of felony without benefit of clergy. The statute further provides by the third section, "that if any person shall utter or tender in payment any false or counterfeit money, knowing the same to be false or counterfeit, to any person or persons; and shall, either the same day, or within the space of ten days then next, utter or tender in payment any more or other false or counterfeit money, knowing the same to be false or counterfeit, to the same person or persons, or to any other person or persons: or shall, at the time of such uttering or tendering, have about him or her, in his or her custody, one or more piece or pieces of counterfeit money besides what was so uttered or tendered; then such person so uttering or tendering the same shall be deemed and taken to be a common utterer of false money; and being thereof convicted shall suffer a year's imprisonment, and find sureties for his or her good behaviour for two years more, to be computed from the end of the said year; and if any person, having been once so convicted as a common utterer of false money, shall afterwards again utter or tender in payment any false or counterfeit money to any person or persons, knowing the same to be false or counterfeit, then such person, being thereof convicted, shall for such second offence be adjudged guilty of felony without benefit of clergy.

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2. *REX V. CIRWAN.* Sum. Ass. 1794. Oxford. 2 Leach, C. L. 634. n.

The prisoner was indicted on the 15 Geo. 2. for unlawfully uttering and tendering in payment to A. B. ten counterfeit halfpence, knowing them to be counterfeit;" and being convicted judgment was respited for the opinion of the judges, who were of opinion that the conviction was wrong, the offence not being within the statute.

The statute is, however only applicable to gold and silver coin.

3. *THE KING V. FRANKS.* Old Bailey. December Session, 1794. 2 Leach. C. L. 644.

The prisoner was indicted on the 15 G. 2. c. 28 for uttering a piece of counterfeit money, counterfeited to the likeness of the current coin of this realm called a shilling. It was proved in evidence that the prosecutor having bargained with the prisoner for six penny worth of fruit, gave him a good shilling to change. The prisoner took the shilling, and after having put it into his mouth, to try, as he said, if it was a good one returned a shilling to the prosecutor, telling him it was bad. The prosecutor then gave him another, and also a third, which he served in the same way, returning in their stead counterfeit money. It was contended for the prisoner that the legislature, in the stat. on which this indictment was founded, meant to punish the uttering of bad money only when it was as the words of the act expressed it, in payment, and that the indictment should have stated that the uttering was in payment. *Per Cur.* It is clear that this case is within the words of the statute. The act was penned in the disjunctive throughout. The words are, "If any person whatsoever shall utter, "or" tender in payment any false or counterfeit money, knowing the same to be false or counterfeit, &c." The uttering, therefore, is a distinct and independent act from the tendering in payment; and the indictment is right. The prisoner was accordingly found guilty.

The words of the stat. "utter or tender in payment," are in the disjunctive and will consequently extend to an uttering of counterfeit money, though it be not tendered in payment.

upon the prisoner, containing about 20, each wrapped up in soft paper to prevent their rubbing, and there was nothing to induce a suspicion that the prisoner had coined them; on a case reserved, the judges were of opinion unanimously, that procuring with intent to utter was an offence, and that the having in possession unaccounted for, and without any circumstances to induce a belief that the prisoner was the maker, was evidence of procuring; *Russ. & Ry.* 266. But the effect of such evidence would be removed by circumstances sufficient to induce a suspicion that the prisoner was the maker of the coin found in his possession; and upon the argument in the last case. Thomson, C. B. mentioned a case where he had directed an acquittal, because from certain powders, found upon the prisoner, there was a presumption that he was the maker of the coin; *ibid.*

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An associate not present, nor co-operating at an uttering of bad money, is not liable to be convicted with the actual utterer, merely on the ground that he is an utterer also, and has other bad money about him for the purpose of uttering. Where the indictment charges two utterings on the same day, each in a different count, the Court cannot pronounce the greater punishment of the third section of the statute. But where two utterings are charged in one count or the indictment, on a certain day therein named, the fact will be sufficiently averred.

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The indictments need not state that the offender was a common utterer of false money, to warrant the greater punishment of the third section of the statutes.

(b 1) *As to the parties by whom the offence may be committed.*

REX v. ELSE AND ANOTHER. E. T. 1808. 1 Russ. & Ry. C. C. R. 142.

The prisoners were indicted for uttering a bad shilling to A. B. and having another bad shilling in their possession at the time. The uttering was by one of them alone, in the absence of the other. The judges, on a case reserved, held, that the prisoner who was absent, was not liable to be convicted with the actual utterer; although proved to be his associate on the day of the uttering.

(c 1) *As to the indictment, and proceedings incident thereto.*(b 2) *As to the indictment.**

1. REX v. TANDY. Quar. Sess. 1799. Old Bailey. 2 Leach, C. L. 833; S. C. 1 East, P. C. 182. S. P. REX v. SMITH. Sum. Ass. 1799. Maidstone. 2 Leach, C. L. 856.

The indictment in this case charged the prisoner in the first count with having, on the 15th of December, 39 Geo. 3. uttered to one G. J. a counterfeit half-crown; and in the second count with having, on the said 15th December, &c. uttered another counterfeit half-crown to the same person; and the prisoner was convicted on both counts. The question was raised, whether the uttering the counterfeit money twice on the same day being stated in two counts, the Court could pronounce the greater punishment inflicted by the third section of the statute, or must give only the smaller punishment inflicted by the second; and upon reference to the judges, they held that this indictment was not sufficient to subject the prisoner to the larger penalty, as for uttering two pieces of counterfeit coin on the same day, there being no distinct averment of that fact.

2. REX v. MARTIN. Lent Ass. 1801. Old Bailey. 2 Leach, C. L. 923; S. C. 1 East, P. C. Add. XVIII.

The indictment charged that the prisoner, on the 14th day of February, &c. uttered base coin to W. C., and that, on the said 14th day of February, &c. he uttered to J. L. other base coin. This indictment was holden sufficient to warrant the higher punishment of the third section of the statute, the utterings, on the face of the indictment, appearing to be on the same day. And the judges held, at a conference upon this case, that though, when the day is not material, the fact may be proved on a day different from the day laid, yet, when the day is not indifferent, the precise time laid must be proved; and that, in this case, it must be taken that it was proved that the defendant uttered counterfeit coin at two different times of the same day.

3. REX v. SMITH. E. T. 1800. Ex. 2 B. & P. 127; 2 Leach, 858; 1 East, P. C. 183; Russ & Ry. 5. S. P. BENJAMIN LEVI'S CASE. 1 Russ. p. 4. 2d ed.

An indictment stated that the defendant, with force, &c. one piece of false and counterfeit money, made and counterfeited to the likeness, &c. as and for a good, lawful, and current money and silver coin, &c. then and there wilfully, &c. did utter to, &c. her, the said plaintiff, at the time when, &c. then and there well knowing, &c. and also that he, the said defendant, at the time when, &c. had about him one other piece of false and counterfeit money, made, &c. to the likeness, &c. notwithstanding defendant then and there well knowing, &c. The defendant was found guilty; but a point was reserved for the opinion of the judges—whether it was essential that the indictment should aver, in the language of the statute, that the defendant was a common utterer of false money. On such argument it was contended for the defendant, that this case differed from those crimes to which the statute had assigned a technical name, by which only they were known, whereas here the act set out the facts which should constitute the crime, and only concluded severally that a person offending should be deemed or adjudged to be a common utterer, &c. The judges concurred in opinion that the indictment was sufficient.

* As to the general rules to be observed in framing this indictment, *vide ante*, p. 514; and as to the mode of trial, *vide ante*, p. 516; and see Petersdorff's Index, Crim. Div. tit. "Coin."

4. **REX v. MICHAL.** Feb. Sess. 1802. Old Bailey. 2 Leach, C. L. 636; S. C. Consistent 1 East, P. C. 1 East. P. C. add. xix.; Russ. & Ry. 29. S. P. **REX v. BOOTH.** Russ. & Ry. 7.

The indictment in this case charged that the defendant was before that time *in due form of law tried and convicted* at the Guildford quarter sessions on a certain indictment against him for uttering false and counterfeit coin, knowing it to be such; having about him at the time in his custody and possession other false and counterfeit money; and that it was thereupon adjudged by the Court, that he should be imprisoned for a year, and until he found sureties for his good behaviour for two years more; and then averred that, having been so convicted as a common utterer of false money, he afterwards uttered other false and counterfeit money. The objection taken in arrest of judgment, and which was reserved for the opinion of the judges, was this: that in stating the original record and judgment of the court of quarter session, it is not averred that the Court did *adjudge* the defendant to be a *common utterer*, but only that they convicted and adjudged the prisoner to be imprisoned twelve months, and to find security for his good behaviour for two years more. But the judges held that it was not necessary that the Court should adjudge the defendant to be a common utterer, though the statute says he shall be deemed and taken to be a common utterer, that being a conclusion of law; and it being sufficient for the court before which the defendant is convicted of any offence within the statute, to adjudge him to suffer the punishment inflicted by law on the offender.

5. **REX v. TURNER.** Summer Sess. 1824. Warwick. 1 Ry. & Moody, [534] C. C. R. 47.

The prisoner was tried and convicted in this case for feloniously uttering a false and counterfeit shilling, well knowing the same to be false and counterfeit, contrary to the statute, &c. having been twice before convicted of similar utterings, at misdemeanours, contrary to the same statute. It was objected after the trial, in arrest of judgment, that the present indictment, in setting forth the trial, conviction, and judgment, upon the second indictment for the second offence, (and which were essential to constitute the crime a felony, as charged in the present indictment,) was defective in not stating or alleging a *prout patet per recordum* in respect of those proceedings, as appeared to have been done in the second indictment, in stating the proceedings had under the first indictment. It was also objected, that there ought to have been an allegation that the former convictions and indictments remained in force, unreversed, &c. And further, it was objected that the present indictment did not allege as facts, the actual committing of the two former offences, or even the trials, convictions, and judgments, upon both of them; but the trial, conviction, and judgment upon the second indictment; whereas the second indictment appeared to have alleged a trial, conviction, and judgment on the first. Upon these objections, judgment was respite by the learned judge, who submitted to the judges, whether the judgment should be arrested, or whether, in case the indictment should be deemed defective as an indictment for felony, it would warrant a judgment for the offence as a misdemeanour. The judges held, that the indictment was bad, for the want of a *prout patet per recordum* in the statement of the conviction and judgment for the second offence, and that no judgment could be given for the misdemeanour upon this record. The judgment was therefore arrested. See Russ. & Ry. 5 & 7; 1 East. P. C. 183; 2 Leach, 858.

(b 2) *As to the pleas.* See ante, vol. 2. p. 735. 745.

(c 2) *As to the evidence.**

The evidence to be adduced in support of the prosecutor's charge must depend entirely upon the exact nature and enormity of the crime stated in the indictment; as, for instance, should it be for uttering counterfeit money generally, you must also prove the uttering or tendering in payment the sum in question, and prove it to be base and counterfeit, and then establish that the

* By the 8th section of the 16 Geo. 2. any offender out of prison discovering two or more persons guilty of any of the said offences, so as they be thereof convicted shall be pardoned.

[535] defendant knew it to be counterfeit at the time he uttered it. This of course must be done by circumstantial evidence. If, for instance, it be proved that he uttered on the same day, and at other times, base money of the same description to the same, or to a different person, or had other pieces of base money about him when he uttered the counterfeit money in question, this will be evidence from which the jury may presume a guilty knowledge; 2 Leach, 983; 1 N. B. 92; 1 Campb. 325. This evidence may be given upon the general principle that the conduct of a prisoner is admissible in evidence to prove a guilty knowledge. In such cases, indeed, when the intention does not appear from the transaction itself, it must be inferred from the facts and circumstances. Such previous utterings are therefore evidence, although they may be substantive offences. The whole demeanor of the prisoner may afford frequent evidence of his mind or intention; for it is a general rule, that when crimes intermix, and one is evidence to prove another, the Court must go through the whole detail. There must, however in such cases be such a connection as to warrant the inference of knowledge in the principal case. This may arise in the case of uttering from proximity of time; but the more detached in point of time the previous utterings are; the less relation will they bear to that stated in the indictment. The fact that all the money uttered is from the same die is important to connect the uttering, and to indicate a guilty knowledge. To make any of these circumstances evidence, it is however to be always borne in mind that there must be a strong connection in the subject matter.* Other indications of guilty knowledge and intentions, such as the taking precautions to prevent a quantity of base coin from being injured by rubbing, and the possession of powder, &c. used to give the base coin the usual appearance of coin which has been in circulation, are too obvious to require remark; see 2 Starkie's law of evidence, 378; and Archbold's Pleading's and Evidence, 278. Again, should the indictment be for a subsequent offence, prove 1st. The uttering as above stated; and, if a third offence, it must be proved to have been committed within six months before the commencement of the present prosecution; 15 Geo. 2 c. 28. s. 5; and 27 Geo. 3. c. 126. s. 8; and 2d. Prove the former conviction thus: if they were in the same county, &c. get the clerk of assize, or clerk of the peace to make up the records, and produce them at the trial; if in another county, &c. the clerk of assize and clerk of the peace respectively are required by the statute to give the prosecutor or any other on behalf of his majesty upon application a short transcript, which being produced in court shall be sufficient evidence of the same, and for which transcript 2s. 6d. and no more, shall be paid; 15 Geo. 2. c. 28. s. 9; and see Archbold's Crim. Pl. and Ev. 279.

Again, should the indictment be founded on that clause of the act which creates an offence for uttering twice within ten days, prove; 1st. The two offences as has already been pointed out; and 2d. Prove them both to have been [536] committed on the same day, or within the space of ten days, according as it is alleged in the indictment.

Again, should the charge made against the prisoner be for selling counterfeit money, having other counterfeit money at the same time in his possession, prove, 1st. The offence of uttering *ut supra*; and 2d. Prove that the defendant at the same time had about him some more pieces of the counterfeit money specified in the indictment; *vide ante*, p. 529.

(d 2) *As to the judgment and punishment.*

The judgment to be pronounced will depend entirely upon the nature of the

* Upon an indictment for uttering a bill of exchange, it was held, that the prosecutor was not at liberty to prove that a bank note which was found in the pocket of the prisoner was forged. By Bayley, J. Lancaster Summer Assizes, 1820. M. S. 2 Stark. Ev. 379. Be it appears not to be a sufficient ground for convicting a person of the second offence under the 15 Geo. 2. of having other bad money in possession at the time that such person was associating with another not present at the uttering, who had large quantities of bad money about him for circulation, or that such person on the day after the uttering had in possession a small number of pieces of bad money; Russ. & Ry. C. C. R. 142; and see Buss. and Ry. 25.

offence charged, and on the stat. 15 G. 2. as, for instance, whether it be for uttering counterfeit money generally, the punishment for which crime is six months' imprisonment, and surety for good behaviour for six months more; or whether it be for a subsequent offence, being the second offence, in which case the punishment is two years' imprisonment, and security for good behaviour for two years more; or the third offence in which case the punishment is death; or whether it be for uttering twice on the same day, or within ten days, in which case the punishment is one years' imprisonment, and surety for good behaviour for two years more; but if the crime of counterfeiting be afterwards repeated even once, death; or whether it be for uttering counterfeit money, having other counterfeit money at the same time in his possession, in which case the punishment for the first offence is one years' imprisonment, and surety for two years' more, and for a repetition of any crime of uttering or tendering counterfeit money, death.

An indictment on the 15 Geo. 2. c. 28. s. 2. for feloniously uttering counterfeit coins after two convictions and judgments for misdemeanor, on the same statute, must, it has been seen, ante. p. 534. set out the former convictions and judgments *prout patet per recordum*, and that a judgment for misdemeanors cannot be given, on an indictment for felony, but for want of such averment.

2. *Of other countries.*

(a 1) *As to what constitutes the offence.*

The 37 Geo. 3. c. 126. declares, that if any person shall utter or tender in payment, or give in exchange, or pay or put off to any person, any false or counterfeit coin, not the proper coin of this realm, nor permitted to be current within the same, resembling, or made with intent to resemble, any gold or silver coin of any foreign prince, state, or country, or to pass as such foreign coin, knowing the same to be false or counterfeit; and shall be thereof convicted; every such person shall suffer, for his first offence, six month's imprisonment, and surety for six months' more; for his second, two years imprisonment, and find sureties for two years more; and for his third, shall be adjudged guilty of felony, without benefit of clergy.*

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(b 1) *As to the parties by whom the offence may be committed.*

Vide ante, p. 532.

(c 1) *As to the indictment and proceedings incident thereto.*

Vide ante, p. 532.

(H) *RELATIVE TO BUYING AND SELLING THE CURRENT COIN.*

(a) *As to what constitutes the offence.*

The statute 5 & 6 Ed. 6. c. 19. enacts, that if any person shall exchange any coined gold, silver, or money, giving, receiving, or paying, any more in value, benefit, profit, or advantage for it, than the same was, or should be declared by the king's proclamation to be current within this realm, and the king's other dominions; that then all the said coined gold, silver, or money, so exchanged, should be forfeited, and the offenders be imprisoned for a year, and fined at the king's pleasure. It was objected in *Rex v. De Yonge*, 14 East, 402; and *Rex v. Wright*, cited 14 East, 404, ante, vol. iii. p. 398. that *the exchanging guineas for bank notes*, taking the guineas in such exchange, at a higher value than they were current for by the king's proclamation, was not an offence within this statute, and, after solemn arguments at several times before the judges, the point was decided in favor of the objection. In consequence of this decision, several legislative provisions during the continuance of the restrictions on the Bank of England as to payments in cash; (see 51 Geo. 3. c. 127; 52 G. 3. c. 50; 53 G. 3. c. 5; 54 G. 3. c. 52.) were made upon the subject, which have now ceased by the operation of the 59 G. 3. c. 41. s. 1. which removed the restrictions on payments in cash, under the several bank acts. The provisions of the 56 G. 3. c. 68. s. 13. as to receiving the current

* The 6th section of the above act imposes certain penalties on persons having in custody above a certain number of pieces of counterfeit foreign coin, and provides for the destruction of such coin; and see 9 & 10 W. 3. c. 21. s. 1; 12 Geo. 3. c. 71. s. 1; and 56 Geo. 3. c. 68. s. 7.

gold coin for more or less than its value, according to its denomination, are, however, as follows; that no person shall by any means, device, shift, or contrivance whatsoever, receive or pay for any gold coin lawfully current within the united kingdom of Great Britain and Ireland, any more or less in value, benefit, profit, or advantage, than the true lawful value which such gold coin doth or shall by its denomination import; nor shall utter or receive any piece or pieces of gold coin of this realm at any greater or higher rate or value, nor at any less or lower rate or value than the same shall be current for in payment, according to the rates and values declared and set upon them pursuant to the law; and that every person who shall offend herein, shall be deemed and adjudged guilty of a misdemeanor.

(b) *As to the indictment and proceedings incident thereto.*

1st. *As to the indictment.*

The 15th section of the above act forbids the traversing of any indictment to any assizes or sessions, and declares that the court at which any bill aforesaid shall be found, shall forthwith proceed to try the person against whom the same shall be found, unless good cause be shown why his trial should be postponed. As to the general mode of framing an indictment, reference may be made to a *P. & C. case*; and to Precedents referred to in *Petersdorff's Index, Crim. Div. 2d. Ed. 7.*

2d. *As to the plea.* *Vide ante*, vol. ii. p. 735. 745.

3d. *As to the evidence.*

The 16th section of the above act declares, "that on any prosecution or trial of any offender or offenders hereafter to be prosecuted or tried for any offence against this act, it shall not be necessary to prove that the gold coin received or paid, or uttered contrary to this act, is the current coin of this realm, but the same shall be deemed and taken so to be, if received or paid, or uttered as such, until the contrary thereof shall be proved to the satisfaction of the judge, justice, or court, before whom any such offender or offenders shall be prosecuted or tried." The evidence necessary to support the indictment is *prima facie*. The buying and selling must be clearly established, and the same rules observed, otherwise, as in general cases. Should the indictment charge a second offence, the punishment of which is, it will be seen, greater, the 17th section has facilitated the proof of the prior conviction, by providing that the clerk of the peace shall certify such conviction, for which 2s. 6d. and no more, shall be paid, and enacting that such certificate being produced in court shall be sufficient evidence of such former conviction.

4th. *As to the judgment and punishment.*

The judgment and punishment must follow the nature of the offence charged in the indictment. The above act declares, that the party being convicted by due course of law, shall suffer imprisonment for the term of six calendar months, and shall find sureties for his or her good behaviour for one year more, to be computed from the end of the said six months; and if the same person shall afterwards be convicted of the like offence, such person shall, for such second offence, suffer one year's imprisonment, and find sureties for his or her good behaviour for one year more, to be computed from the end of the said last mentioned year; and if the same person shall afterwards offend against this act, and shall by due course of law be convicted of any subsequent offence, he or she shall be imprisoned for the term of two years for every such subsequent offence.

Collateral Security or Undertaking. See *tit. Contract; Corrompt; Frauds, Statute of; Stamp*;

Collateral Consanguinity. See *tit. Descents*.

Collateral Descents. See *tit. Descents*.

Collatibve. See *tit. Adcorson*.

Collector. See *tit. Post-horse Act; Rent; Taxes*.

COLLEGES. See *tit. Hospital; Mandamus; Mortmain; Physicians, College of; University; Visitor*.

* **COLONEL.** See *tit. Army; Contract.*

COLONIES OR PLANTATIONS.* See also African Company; Bankrupt; Contract; East India Company; Executors and Administrators; Hudson's Bay Company; Insurance; Interest; Navigation; Russia Company; Sierra Leone Company; South Sea Company; Turkey Company; Witness.

I. OF THE LAWS OF THE MOTHER COUNTRY IN FORCE IN THE COLONIES, p. 539.

II. OF THE INTERNAL REGULATIONS OF THE COLONIES.

(a) Of the general system of the internal regulations, p. 543. (b) ——— punishment of crimes and redress for civil injuries, p. 546.

1st. Of the punishment of crimes, p. 546. 2d. ——— redress of civil injuries, and breaches of contract, p. 547.

* As to the benefits or disadvantages accruing to the parent state from the establishment and protection of colonies, see Rees's Cyclopaedia, *tit. Colony*; Smith, W. N. b. 4. c. 7; Brougham's Colonial Policy; Tucker on Trade; Stok's Law of the Colonies. The terms colony and plantation are used indiscriminately; the latter first came into use. It implied the idea of introducing, instituting, and establishing, where every thing was desert before; as the plantation of Ulster, of Virginia, of Maryland, and other places. The word colony, which is derived from the Latin *colonia* (in which language it signifies simply a plantation), is said not to have been generally adopted till the reign of Cha. 2., and denoted the political relation in which the plantation stood towards this kingdom. In different parts of New-England (for instance) voluntary societies had been formed among persons who had left the mother country on account of restraints imposed upon them in matters of religion, without the direction or participation of the English government; so that in the time of Cha. 2. there were not wanting persons who pretended to doubt of their constitutional dependence on the crown of England; and it was recommended, in order to put an end to such doubts, that the king should appoint governors, and so make them colonies; Reeve's Hist. Ship. 188; Smith, W. of N. b. 4. c. 7. vol. ii. 359. 411. A colony, therefore, might be considered as a plantation that had a governor and civil establishment, subordinate to the mother country. All the plantations in America, except those of New-England, had such an establishment, and they were, according to this idea, colonies as well as plantations. In the statutes of 7 & 8 W. 3. c. 22. and the navigation acts made afterwards, the two terms are used without distinction. Newfoundland is considered as a colony or plantation, as in reason it ought to be; for although it has already been regarded only as a fishery, and the policy of the government has been to prevent planting and colonization there, yet the original design was to plant that island as well as Virginia, or any other part of America, and the original charters appear to have been granted to planters as well as to merchant adventurers; (see 15 Car. 2. c. 7. s. 7. &c.; 25 Car. 2. c. 7; Reeves's Hist. Ship. 128; as to importation of fish and oil in foreign ships from Newfoundland, Op. of Sir J. Hawles, Jan. 24, 1698, Op. on 4 Geo. 3. c. 15.) But the term plantation is only applied to colonies that are settled principally for the purpose of raising produce; it has not been extended to the British dominions in Europe, neither to Dunkirk, Toulon, or Calais, while those places were in our possession, nor at the present day to Jersey or Guernsey, or the islands in the English channel.

Colonies or plantations are obtained either by conquest or by treaty, or by taking possession of and populating therein, when discovered uninhabited.

When a country is obtained by conquest or treaty, the king possesses an exclusive prerogative power over it, and may entirely change or new model the whole, or part of its laws, and political form of government; Dyer, 224; Vaugh 281; 7 Rep. 17. The king may, *per se*, tax a conquered country; 2 Chalmer's Opinions, 140-1; and govern it by regulations framed by himself. For instance, ever since the conquest of Gibraltar, in which, besides the garrison, there are inhabitants, property, and trade, the king has made orders and regulations suitable to those who live, &c. or enjoy property in that place; Cowper, 211; 1 F. 806; (see a clear and very able opinion on this subject, 1 Chalmer's Op. 169.) A country, however, a country conquered by British arms becomes a dominion of the king in right of his crown, it is necessarily subject to the legislature of Great Britain, and consequently his majesty's legislative power over it, as conqueror, is subordinate to his own authority in parliament; so that his majesty cannot make any new change contrary to fundamental principles, or exempt the inhabitants from the power of parliament; Cowper, 209. Nor can the king legally disregard or violate the articles on which the country is surrendered or ceded; but such articles are sacred and inviolable, according to their true intent and meaning; *ibid* 298. *et supra*. It is necessary and fit that the conquered country should have some laws, and therefore, until the laws of the country thus acquired are changed by the new sovereign, they still continue in force: 7 Rep. 17; Show, Parl. Cas. 81; 1 Blac. Com. 107-8; 2 P. W. 75-6. As observed by Lord Mansfield, Cowp. 209, the absurd exception as to an infidel country, mentioned in Calvin's case; 7 Rep. 17, shows

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1. CAMPBELL V. HALL. M. T. 1774. K. B. Cowp. 204.

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On the capitulation of the island of Grenada it was agreed by the articles of capitulation, that it should be governed by the existing laws until his majesty's pleasure should be known, and that the inhabitants of the island should enjoy their property and privileges as fully as the other subjects of his majesty in the British Leeward Islands. A treaty of peace was afterwards signed, by which Grenada was ceded to Great Britain. The treaty was made on the 10th Feb. 1763; and in the next year a proclamation issued under the great seal, by which it was declared that the king had commissioned his governor, as soon as the state and circumstances of the colony would admit, to call an assembly to enact laws. Another proclamation was issued on the 26th March, 1764, reciting a survey, and division of the ceded islands, which his majesty had ordered to be divided into allotments, as an invitation to purchasers to come in and purchase on the terms specified in the proclamation. On the 9th of April, 1764, a commission actually issued, in compliance with the promise held out in the proclamation, appointing General Melville governor, with a power to summon an assembly as soon as the state and circumstances of the island would admit, and to make laws with the consent of the governor and council, with reference to the manner adopted in the other assemblies in the king's provinces in America; but before the arrival of the governor at Grenada, indeed before his departure from London, letters patent were issued under the great seal, by which an alteration was made in the duties that had been established while the island was in possession of the French, and the exportation of sugar, and the duties were made the same as those payable in the other British Leeward Islands. On the validity of these letters patent a question arose; and though the abolition of the French duties, and substitution of the new tax were just and equitable, with respect to Grenada itself and the other Leeward Islands, yet, through inattention in inverting the order in which the instruments should have passed, the letters patent were contradictory to the former acts of the crown, and were therefore determined to be void. The two proclamations and the commission to governor Melville were considered as amounting to an irrevocable grant to all who might be inhabitants, or might acquire property in the island of Grenada, or, more generally, to all whom it might concern, that the subordinate legislation over the island should be exercised by the assembly, with the consent of the governor and council, in like manner as the other islands belonging to the king. There was no reservation in the original proclamation of any legislative authority to be exercised by the king, or by the governor and council under his authority, till the assembly should meet; for it alluded to a government by laws in being, and by courts of justice, not by a legislative authority, until an assembly should be called, after the proclamation, therefore, acts of legislation could only be performed by the assembly of the island, or by acts of the parliament of Great Britain.

Lord Mansfield, in delivering the judgment of the Court in the preceding case, laid down the following propositions as clear. —1st. A country conquered the universality and antiquity of the maxim. So where the law of the vanquished territory are rejected without the substitution of other laws, or are still in force on any particular subjects, such territory is to be governed according to the rules of natural equity and right; 2 Salk. 412. The king may preclude himself from the exercise of his prerogative legislative authority in the first instance, over a conquered or ceded country, by promising to vest it in an assembly of the inhabitants and a governor, or by any other measure of a similar nature, by which the king does not claim or reserve to himself this important prerogative, Cowp. 214; Chitty, Jun. Prer.

If an uninhabited country be discovered and peopled by English subjects, they are supposed to possess themselves of it for the benefit of their sovereign, and such of the English laws then in force as are applicable and necessary to their situation, and the condition of an infant colony, as for instance, laws for the protection of their persons and property, are immediately in force; 2 P. W. 75; 2 Salk. 411. pl. 1; 2 Ld. Raym. 1245; 1 Bla. Cam. 107. Wherever an Englishman goes, he carries with him as much of English law and liberty as the nature of his situation will allow.

ed by the British arms becomes a dominion of the king, in right of his crown; force till al and, therefore, necessarily subject to the legislature, the parliament of Great Britain. 2d. The conquered inhabitants, once received under the king's protection, become subjects, and are to be universally considered in that light, not as enemies or aliens. 3d. The articles of capitulation upon which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable, according to their true intent and meaning. 4th. The law and legislative government of every dominion, equally affects all persons and all property within the limits thereof; and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the law of the place. 5th. The laws of a conquered country continue in force, until they are altered by the conqueror: the absurd exception as to Pagans, mentioned in Calvin's case, shows the universality and antiquity of the maxim. For that distinction could not exist before the Christiana era; and in all probability arose from the mad enthusiasm of the Crusades. In the present case, the capitulation expressly provides and agrees, that they shall continue to be governed by their own laws, until his majesty's further pleasure be known. 6th. If the king (and when I say the king, I always mean the king, without the concurrence of parliament) has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in parliament, he cannot make any new change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion; as for instance, from the laws of trade, or from the power of parliament, or give him privileges exclusive of his other subjects; and so in many other instances which might be put. 2. BLANKARD V. GAIJDY. T. T. 1692. K. B. 2 Salk. 411; S. C. 4 Mod. 225.

In debt on a bond the defendant prayedoyer of the condition, and pleaded the statute E. 6. against buying offices concerning the administration of justice; and averred, that this bond was given for the purchase of provost-mary. shall in Jamaica, and that it concerned the administration of justice, and that Jamaica is part of the revenue and possessions of the crown of England. The plaintiff replied, that Jamaica is an island beyond the seas, which was conquered from the Indians and Spaniards in Queen Elizabeth's time, and the inhabitants are governed by their own laws, and not by the laws of England. The defendant rejoined, that before such conquest they were governed by their own laws; but since that, by the laws of England. The Court held, that in case of an uninhabited country newly found out by English subjects, all laws in force in England are in force there; but that an act of parliament in England would not be binding on the new colony, unless it be particularly named.

II. OF THE INTERNAL REGULATIONS OF THE COLONIES.*

(a) *Of the general system of the internal regulations.*

1. CAMPBELL V. HALL. M. T. 1774. K. B. 1 Cowp. 208.

Per Lord Mansfield: whoever purchases, lives, or sues in a colony, puts

* But a country that comes to the crown by title or descent retains its old laws, which cannot be altered by the king without the authority of an act of parliament; Calvin's case, 7; Rep. 17.

† And in the year 1722 these points were expressly recognised upon an appeal to the king in council from the foreign plantations. 1st. That if there be a new and uninhabited country observed by English subjects, such new-found country is to be governed by the laws of England; but that, after it becomes inhabited, it shall not be bound by English statutes, unless specially named. 2dly. That when the king of England conquers a country, he may impose upon the inhabitants what laws he pleases. But, 3dly. that until such laws be given by the conqueror, the laws and customs of the conquered country shall hold place, except where they are contrary to the established religion, or enact any thing *malum in se*, or are *silent*, for that in all such cases the laws of the conquering country shall prevail; 2 P. Wms. 75; see also Com. Dig. Ley. C. Show P. C. 32; Doug. 38; 1 Chalm. 28. 220. 2 w. 202; Com. Dig. Navigation G. 3; 2 Ld. Raym. 1245; Stoke's Law of Colonies, 30; 4 Bl. Com. 109.

‡ With respect to their interior polity our colonies are properly of three descriptions: 1st. Provincial establishments, the constitutions of which depend on the respective coun-

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An English man residing in a colony subjects himself to all the local regulations of the place.

himself under the law of the place. An Englishman in Ireland, Minorca, Isle of Man, or the plantations, has no privilege distinct from the natives.

2. BUCHANAN V. RUCKER. H. T. 1808. K. B. 9 East, 192.

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But it is essential, that by residence in it he should have bro't himself within its jurisdiction.

This was an action of *assumpsit* on a judgment obtained in the island of Tobago. It appeared in evidence that the defendant, when sued in the colony, had only been summoned "by nailing up a copy of the declaration at the Court-house door;" but no proof was adduced to show that he had ever been present in the colony, or subject to the jurisdiction of the Colonial Court at the time of the commencement of the suit, or at any subsequent period. By a law of the district, it was provided, that if a defendant be *absent from the Island*, and having no attorney, or manager, there, such mode of summoning shall be deemed good service. It was contended, on a motion to set aside a

missions; (see the form of a Governor's Commission, Stokes, ch. 4.) issued by the crown to the governors, and the instructions which usually accompany those commissions, under the authorities of which provincial assemblies are constituted, with the power of making local ordinances, not repugnant to the laws of England. 2d. Proprietary governments, granted out by the crown to individuals, in the nature of feudal principalities, with all the inferior regalities and subordinate powers of legislation, which formerly belonged to the owners of counties palatine; yet still with these express conditions, that the ends for which the grant was made be substantially pursued, and that nothing be attempted which may derogate from the sovereignty of the mother country. 3d. Charter governments in the nature of civil corporations, with the power of making bye-laws for their own interior regulation, not contrary to the laws of England; and with such right and authorities as are specially given them in their several charters of incorporation. The form of government in most of them is borrowed from that of England. They have a governor named by the king, (or in some proprietary colonies by the proprietor) who is his representative or deputy. They have courts of justice of their own, from whose decisions an appeal lies to the king and (in) council here in England. Their general assemblies, which are their House of Commons, together with their councils of state, being their upper house, with the concurrence of the king, or his representative, the governor, make laws suited to their own emergencies. But it is particularly declared by statute 7 & 8 W. 3. c. 22. that all laws, bye-laws, usages, and customs, which shall be in practice in any of the plantations, repugnant to any law made or to be made in this kingdom, relative to the said plantation, shall be utterly void and of none effect. And, because several of the colonies had claimed a sole and exclusive right of imposing taxes upon themselves, the statute 6 G. 3. c. 12. expressly declares that all his majesty's colonies and plantations in America have been, are, and ought to be, subordinate to, and dependant upon, the imperial crown and parliament of Great Britain, who have full power and authority to make laws and statutes of sufficient validity to bind the colonies and people of America, subjects of the crown of Great Britain, in all cases whatsoever. And this authority has been since very forcibly exemplified and carried into effect by the statute 7 Geo. 3. c. 59. for suspending the legislation of New-York, and by several subsequent statutes. Hence it is clear that, generally speaking, the common law of England does not, as such, hold in the British colonies; such colonies are distinct from, though dependent on, England; are subject to the control of parliament, though not bound by any acts of parliament, unless particularly referred to therein.

On obtaining a country, or colony, the crown has sometimes thought fit, by particular express provisions under the great seal, to create and form the several parts of the constitution of a new government; and at other times has only granted general powers to the governor to frame such a constitution as he should think fit, with the advice of a council, consisting of a certain number of the most competent inhabitants, subject to the approbation or disallowance of the crown. In most instances there are three departments forming the colonial government, each of which deserves attention. 1st. The governor, who derives his power from, and is substantially a mere servant or deputy of, the crown, appointed by commission under the great seal. The criterion for his rules of conduct are the king's instructions, under the sign manual. 2d. The colonial councils, which derive their authority, both executive and legislative, from the king's instructions to the governor. 3d. The representative assemblies, chosen by certain classes of the colonial inhabitants. The right of granting this assembly is vested exclusively in the crown, subject to after regulations by the local legislature.

The governor of colonies are in general invested with royal authority; they may call, prorogue, (adjourn) and dissolve the colonial assemblies, and exercise other kingly functions: but still they are but the servants or representatives of the king. *Prima facie*, however, their acts remain good, and though the king may refuse to confirm, and may revoke the governor's assent to an act of the assembly, it appears that, till revoked, such assent is, generally speaking, effective; 1 Chalm. 306. And there can be no doubt that, though the discretion in passing acts of parliament in England is an incommunicable prerogative, it is not so as to acts of assembly. but may be legally communicated to

nonsuit, that as this was the established law of Tobago, it was no objection [545] that the defendant had never appeared to have been within the limits of the island, nor to have had any attorney there, nor to have been in any other way subject to the jurisdiction of the court at the time.

Sed per Lord Ellenborough: it is quite certain that, by persons absent from the island, must necessarily be understood persons who have been present, and within the jurisdiction, so as to have been subject to the process of the Court; but it never can be applied to a person who, for aught appears, never was present within or subject to the jurisdiction.

the governor of a colony. The same as to pardoning offenders in the colonies; though it is usual to except the cases of treason and murder; 1 Chalm. 190. Nor can there be any doubt that the king may enable the governor to grant crown lands, franchises, and possessions in the colonies. The acts of the governor should be under the great seal of the province, unless an usage *e contra* can be shown. His commission may be determined by the demise of the crown, as other offices under the crown are: but it seems that his acts done at any time, though after the determination of his office by the demise of the crown, or appointment of a new governor, and before notice thereof, are good. Nor will the determination of his patent *per se* annihilate the authority of other officers acting independently, though subordnately; 1 Chalm. 250.

But the powers of governors of colonies demand a more explicit statement. Every governor of a province, by his commission of captain-general and governor-in-chief, and by his commission of vice-admiral, and the instructions which accompany them, is vested with the following powers:—

1. He is a captain-general of the forces by sea and land within his province; and where a provincial establishment, or king's government, joined a charter colony, it was usual to make the governor of the provincial establishment captain-general of the forces by sea and land, within such charter colony. The governor has also the appointment of all militia officers; Stokes, 185—190.

2. As governor-in-chief he is one of the constituent parts of the general assembly of his province, and has the sole power of convening, adjourning, proroguing, and dissolving the general assembly: he may also give or refuse his assent to any bill which has passed the council and assembly. The governor has also the disposal of such employments as his majesty does not dispose of himself; 1 Chalm. 168: and with respect to such offices as are usually filled by the immediate appointment of his majesty, if vacancies happen by death or removal, the governor appoints to such offices until they are filled up from home; and the persons appointed by the governor receive all the profits and emoluments of such offices, until they are superseded by the king's appointment of others.

3. The governor has the custody of the great seal, and is chancellor within his province, with the same process of judicature that the lord high chancellor has in England; Stokes, 191.

4. The governor is ordinary within his province; and, by virtue of the king's commission, he collates to all vacant benefices; he has also the power of granting probate of wills and administration of intestates' affairs, by virtue of his instructions; Stokes, 199.

5. The governor presides in the Court of Errors, of which he and the council are judges, to hear and determine all appeals in the nature of writs of error, from the superior courts of common law in the province.

6. The governor is usually named first in the standing commission, issued under the 11 & 12 Wm. 3. c. 7. for the mere effectual suppression of piracy.

7. The governor is also vice-admiral within his province; but he does not sit in the Court of Vice-Admiralty, there being a judge of that court, who is usually appointed from England. In time of war, commissions to privateers are issued by the judge of the Court of Vice-Admiralty, in consequence of a warrant from the governors; Stokes, 199, *et seq.*

With respect to the colonial assemblies, it is most important that any idea that they stand on the same footing as the English House of Commons should be excluded from consideration. The principles on which the English parliament rests its rights, powers, and privileges, cannot be extended to a provincial assembly. Parliament stands on its own laws; the "*lex et consuetudo parliamenti*," which are founded on precedents and immemorial usage. The plantation assemblies derive their energies from the crown; and are regulated by their respective charters and usages, and by the common law of England. The constitutions of the English parliament and the colonial assemblies necessarily differ: the latter cannot in general even adjourn themselves; this is done by the governor, who, as representative of the king, is the first branch of this subordinate legislature. It is however generally true that a legal and confirmed act of assembly has the operation and force in the colonies, that an act of parliament has here.

Local circumstances, and the necessity of the case, must also create several differences between parliament and the colonial assemblies with respect to the prerogatives of the king, as their "*caput, principium; et finis*." So that there can be no doubt that the king may assent to an act of assembly before it meets; or dissent though the session be closed.

[546] (b) *Of the punishment of crimes, and redress for civil injuries and breaking of contract.*

Crimes being deemed local in their nature an indictment can not be supported for an offence committed in the plantations.

without the aid of an act of parliament,*

Unless part of the offence be completed in England.

1st. Of the punishment of crimes.

REX v. MUNTON. M. T. 1793. K. B. 1. Esp. 62; S. C. 6 East, 590. cited.

This was an information against the defendant, a government storekeeper in Antigua, who, whilst resident there, transported false vouchers to his agent in London, which were afterwards delivered by the agent to the Navy office in town; upon the trial it was objected, that this court had no jurisdiction, the offence having been wholly done and completed in the West Indies, and that in order to give the court jurisdiction over matters committed out of the realm, there ought to be an express statute. Lord Kenyon, C. J. admitted the validity of the objection, but said, it did not apply to this case, because the offence had been completed in England by sending the false returns from Antigua to the Navy-office.

The prerogative of dissenting to colonial acts is so material to the existence of the king's sovereignty, that there can scarcely be imagined a case in which such power could not be exercised; 1 Chalm. 315.

Though the statute 7 & 8 Wm. 3. c. 15. as to the continuance of parliament after the demise of the crown, does not extend to the plantations; several very cogent reasons have been urged in support of the doctrine, that the demise of the crown does not dissolve a colonial assembly. And the death or change of the governor, who is merely the representative of the sovereign, does not, it seems, produce that effect.

The dependence of the colonies on the crown, and the sovereignty of the king over them, are not weakened or affected by the terminations of their charters. The king may accept the surrender of a charter granted to the proprietor of a colony, subject to the rights of third persons, previously acquired under the charter; and in these cases the crown may resume the reins of government, and may, by proclamation under the great seal, authorise existing magistrates and officers to continue in the exercise of their respective functions. So as the king has a right to govern and protect all his subjects, it seems that even during the existence of a charter the king may take it away, and grant fresh powers to another in cases of positive necessity; and upon an extraordinary exigency, happening through the default or neglect of a proprietor of a colony, or of those appointed by him or their inability to protect or defend the inhabitants in times of war or imminent danger; but in such case previous civil rights remain, and must be respected. In this case also, and in others where a charter to a colony is forfeited, an inquisition and *scire facias* to repeal should regularly be adopted. If the king lose a territory acquired by conquest, and re-conquer it, the former rights of the inhabitants, under charters granted by the crown, revive and are restored, *jure postliminii*; a conquest by an enemy merely operating as a suspension, not as an extinguishment, of the rights of former owners; Chalm. 108; Chit. jan. Prer.

* This rule led to the passing of the 11 & 12 W. 3. c. 12. which enacts, that if any governor, lieutenant-governor, deputy-governor, or commander-in-chief of any plantation or colony within his majesty's dominions beyond the seas, shall be guilty of oppressing any of his majesty's subjects beyond the seas within their respective governments or commands, or shall be guilty of any other crime or offence contrary to the laws of this realm, or in force within their respective governments or commands, such oppressions, crimes, and offences shall be tried in the Court of K. B. in England, or before such commissioners, and in such county of the realm, as shall be assigned by his majesty's commission, and that the same punishments shall be inflicted as are usually inflicted for offences of the same kind in England. Another statute has since been passed of more extensive operation, to secure the trial and punishment of persons holding public employments, who might be guilty of crimes abroad; the stat. 42 G. 3. c. 85. provides, that any person holding a public station, office, or employment, out of Great Britain, and guilty of an offence in the exercise of his public functions, may be tried in the K. B. on an information exhibited by the Attorney General, or an indictment found, and all persons so offending and tried under this act, or the statute of William, shall receive the same punishment as is inflicted on similar offences when committed in England, and are also liable at the discretion of the Court to be adjudged incapable of his serving his majesty or holding any public employment. So the East India Bill, 13 Geo. 3. c. 65. authorized the trial of offences committed by his majesty's subjects in India, in the Court of K. B., and the stat. 24 Geo. 3. c. 64. contained some special provisions for the trial of British subjects holding public employments in the East Indies, who might be guilty of extortion and other misdemeanours. It is also proper to notice, that the trial of treason, of murder, and of manslaughter, when committed out of the realm, is provided for by the statutes 35 H. 8. c. 2; 33 H. 8. c. 23; and 44 Geo. 3. c. 112; and the stat. 28 H. 8. c. 15. which authorizes the trial of treasons, felonies, robberies, and murders, committed on the high seas; and it seems to have been considered, that this act extends to the colonies, though they were established before the act was passed, and that a commission might issue into any county within the realm of England, to try

2d. *Of the redress of civil injuries, and breaches of contract.*

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1. DOULSEN v. MATTHEWS. H. T. 1792. K. B. 4. T. R. 503. SKINNER v. TRESPASS EAST INDIA COMPANY. Cited in MOSTYN v. FABRIGAS. Cowp. 167. RE *quare clausum fregit*, can not be sustained in the colonies. Cited 1 Cowp. 280. contra.

Trespass for entering the plaintiffs premises in Canada; it was successfully objected, that such an action could not be maintained in this country; Buller, tained in J. observing, it is now to late to inquire whether it were wise or politic to try for a make a distinction between transitory and local actions; it is sufficient for the courts that the law has settled the distinction, and that an action *quare clausum fregit* is local; the court may try actions here which are in their nature transitory, though arising out of a transaction abroad, but not such as are in their nature local.

2. WAY v. YALLY. T. T. 1704. K. B. 2 Salk. 651; S. C. 6. Mod. 194; S. C. 3 Salk. 381; Holt, 705. But an action of covenant or debt for rent of lands in the colonies where there is a privity of contract. may be brought in England.†

Debt for rent for lands in Jamaica by lessor against lessee; venue London. The defendant pleaded to the jurisdiction of the court, that the matter ought to be tried in Jamaica; and it was urged, that the lessor cannot bring debt here against the assignee of a term of lands in Ireland, and that if entry and ouster were pleaded, it could not be tried here, and in this case the right of the plaintiff and defendant depends on foreign laws, which cannot be given in evidence here.

Et Per Cur. Where an action is local, it must be laid accordingly; therefore, if the lessor declares on the privity of estate, and that lies in Ireland; for the action is founded on a privity of estate. Otherwise, where it is founded on a privity of contract, which is transitory; as debt for rent by lessor against lessee; for that may be maintained where the land lies not.

3. MOSTYN v. FABRIGAS. M. T. 1774. K. B. Cowp. 161; S. C. 2 Bl. Rep. 929; 11 Harg. Stra. Tri. 162; S. P. Per de Gray, C. J. 2 Bl. 1058.

This was an action for false imprisonment, brought by a native and inhabitant of Minorca (then part of the dominions of the crown of Great Britain) [548] against the governor of the island, for imprisoning the plaintiff at Minorca, Or personal aggressions or injuries to person at proper ty. and causing him to be carried thence to Carthage in Spain. The plaintiff laid the venue in London, stating the injury to have been committed at Minorca, to wit, at London, in the parish of St. Mary-le-Bow, &c. The defendant justified, on the ground that the plaintiff had endeavoured to create a mutiny among the inhabitants of Minorca, whereupon the defendant, as governor, was obliged to seize the plaintiff, and imprison him, &c. The plaintiff replied *de injuria sua propria*. After verdict for plaintiff with 3,000l. damages, a bill of exception was tendered; and error having been assigned thereon, it was contended, (among other things) 1st. That the plaintiff, being a an offender guilty of murder on the high seas, who might be brought over for that purpose, and the witnesses examined, and the jury sworn before the commissioners; see also 39 Geo. 3. c. 37.

* So a bill for the delivery of the possession of lands in St. Christopher cannot be supported, though it might to account for the rents thereof; for lands in the plantations are no more under the jurisdiction of the Court of Chancery, than lands in Scotland, as that court only *agit in personam*; Roberdean v. Rous, 1 Atk. 544. A contract, however, relating to possessions in the colonies, may be enforced or executed *in personam* in a court of equity here; Penn v. Lord Baltimore, 1 Ves. 444; White v. Hall, 12 Ves. jun. 321; Jackson v. Petrie, 10 Ves. jun. 165. But where the question upon the construction of the contract for a security by way of mortgage having been before a court of competent jurisdiction in the colony, and a foreclosure and judicial sale directed, and certain allegations of fraud were merely general and denied, and an injunction was refused in the Court of Chancery in England; on the ground of a want of jurisdiction to interfere; but it was intimated that the lords of the council might, perhaps, give some directions to prevent a sale until an appeal; White v. Hall, 12 Ves. jun. 321. It has been decided, that from a decree respecting lands in the Isle of Man, or in the plantations, an appeal lies generally to the king in council, and no words in a grant can deprive a subject of his right to appeal, much less if the grant be silent; Christian v. Corren, 1 P. W. 329; 2 P. W. 262; Sel. Ca. Ch. 5; 9 Mod. 124.

† Though not where such privity does not exist; see 1 Saund. 241. b. n. b. 710. 2. a; 11 Harg. 776; 3 Lev. 154; 6 Mod. 194; 2 East, 279; 1 Show. 190. 199; 4 T. R. 503.

A habeas corpus may be obtained to send to the colonies, though it is more usual to proceed upon affidavit and petition for redress to the king in council.

A contract void by the colonial law for want of a stamp, can not be enforced in England.*

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Or where in order to reduce the claim to a certainty, a reference to an officer in the colony is required; see ante.

But an action will lie here on a judgment, or a decree obtained in the colonies.†

But such judgment is only deemed a simple

Minorquin, was incapacitated from bringing an action in the king's courts in England; but it was holden, that a subject born in Minorca was as much entitled to appeal to the king's courts, as a subject born in Great Britain; and that the objection of its not being stated on the record, that the plaintiff was born since the treaty of Utrecht, did not make any difference. 2dly, It was objected, that the injury having been done at Minorca, out of the realm, could not be tried in the king's courts in England; but it was holden, that an action for false imprisonment being a transitory action, it was competent to the plaintiff to lay it in any county of England, although the matter rose beyond the seas. Ser 42 G. 3. c. 85. s. 6. and note, infra; 2 Bl. Rep. 985. 987. 988. 1055.

4. *REX V. COWLE*. T. T. 1759. K. B. 2 Burr. 856.

Per Lord Mansfield. Upon imprisonments in Guernsey and Jersey, and the plantations, I have known complaints to the king in council and orders to bail or discharge, but I do not remember an application for a writ of habeas corpus. Yet cases have formerly happened of persons illegally imprisoned sent from hence, and detained there, when a writ of habeas corpus out of this court would be the properest and most effectual remedy.

5. *ALVES V. HODGSON*. E. T. 1797. K. B. 7 T. R. 241; S. C. 2 Esp. 528. S. P. *CLEGG V. LEVY*. M. T. 1812. 3 Campb. 166.

A promissory note was produced in evidence, which had been made in Jamaica; the defendant objected, that it ought to have been stamped, and proved that by the law of Jamaica it required a stamp. Lord Kenyon thought the objection good; but suffered the plaintiff to take a verdict, with liberty to the defendant to move to enter a nonsuit. In showing cause against a rule nisi obtained for such purpose, it was urged, that the defendant could not avail himself of an objection founded on a revenue law of a foreign country; but Lord Kenyon said: I think we must resort to the laws of the country in which the note was made; and unless it be valid according to them, then it is not obligatory in a court of law here. But as the plaintiff might recover, without this note, on the *quantum meruit*, let there be a new trial. See ante, vol. 4. p. 311. et seq.

6. *SADLER V. ROBINS*. H. T. 1818. N. P. 1 Campb. 253.

This was an action of *assumpsit* on a decree of the Court of Chancery in Jamaica, whereby the defendant had been ordered to pay a certain sum of money to the plaintiff on a certain day, first deducting thereout the defendant's costs, to be taxed by the proper officer. The defendant's costs had not been taxed either at his own request, or upon an *ex parte* proceeding at the instance of the plaintiff.

Per Lord Ellenborough. The sum due under the decree is at present indefinite. It should have been ascertained in the Court of Chancery at Jamaica, and cannot be gone through here at Nisi Prus. Had the decree been perfected, I would have given effect to it as well as to a judgment at common law; the one may be the consideration for an *assumpsit* equally with the other. But the law implies a promise to pay a definite, not an indefinite sum.—Plaintiff non-suited.

7. *WALKER V. WILLES*. M. T. 1778. K. B. 1 Doug. 1. and cases cited in notes.

This was an action of debt on a judgment in the Supreme Court of Jamaica; the first count in the declaration was in the following words; W. W. late of,

* For the rule is universal, that the courts here never give greater or less effect to agreements entered into abroad than they would receive from the law of the state in which they were made; see *post*, tit. Contract; and 2 Stra. 733; 3 H. Bl. 603; 1 Burr. 1077; 1 H. Bl. 123; Cowp. 174; 1 B. & P. 141; 3 Ves. 447; 5 East, 130; 2 Chit. Rep. 53. But they will always enforce contracts made according to the law existing in the country where they have been entered into, though differing from our own principles of jurisprudence; see *Innes v. Dunlop*, abridged *ante*, vol. 4. p. 632; and *O'Callaghan v. Thomond*, 3 Taunt. 32. abridged *post*, tit. Judgment.

† See *ante*, vol. 1. p. 180. If it be a Jamaica judgment, the proper mode of ascertaining the value in English currency, is to multiply the current money by five, and then divide by seven, which produces the sum sterling.

&c., was summoned to answer J. W., F. N. and J. C., assignees of the estate [550] and effects of S. B. a bankrupt. For that whereas the said Samuel, Lewis, contract and also one David Bean, since deceased, in the life-time of the said David, debt, and is and which said David afterwards and before the said Samuel and Lewis be- not conclu- came bankrupt, died, and the said S and L. survived him, that is to say, at sively bind Westminister, in the county of Middlesex, heretofore, to wit, on the last Tues- judgment day in May, in the sixth year of the reign of our sovereign lord the now king, in a court of record. and in the year 1766, in a certain court of record of our said lord the king at the town of St. Jago de la Vega, in the county of Middlesex, in and for the island of Jamaica, and within the jurisdiction of the said court on the said last Tuesday of May, in the said sixth year of our said lord the now king, and in the year 1766, before the Honourable Thomas Beach, Esq., chief judge of the said court, and his associates, then sitting judges of the same court, by the consideration and judgment of the same court, recovered against the said William a certain debt of 220*l.* current money of the said island of Jamaica, and also 1*l.* 16*s.* 3*d.* for their costs and charges by them about their suit in that behalf expended to the said Samuel, Lewis, and David, Bean, in the life-time of the said David, by the said court, of their assent adjudged, whereof the said William is convicted, as by the record and proceedings thereof remaining in the said court, at the town of St. Jago de la Vega, more fully appears, which said judgment still remains in that court in full force, unreserved, unpaid, and unsatisfied, that is to say, at Westminister, in the said county of Middlesex, and that neither the said Samuel, Lewis, and David, or either of them, in the life-time of the said David, nor the said Samuel and Lewis, or either of them, since his decease, nor the said Isaac, Francis, John, Colin, Thomas, and Alexander, as assignees as aforesaid, or either of them, have yet obtained execution of the aforesaid judgment, and the said Isaac, Francis, John, Colin, Thomas, and Alexander, in fact say, that the debt, costs, and charges aforesaid, so recovered aforesaid, amount to a large sum of money, to wit, to the sum of 158*l.* 8*s.* 9*d.* of like lawful money of Great Britain, that is to say, at Westminister aforesaid, in the said county of Middlesex, whereby an action hath accrued to the said Isaac, Francis, John, Colin, Thomas, and Alexander, as assignees as aforesaid, to demand and have, of and from the said William, the said sum of 158*l.* 8*s.* 9*d.* of lawful money of Great Britain, parcel of the sum of 594*l.* 0*s.* 4*d.* above demanded.

The defendant, besides *nil debet*, pleaded also to the first count, "that there is not any such record of the recovery of the said debt, costs, and charges, in the said first count of the said declaration mentioned, against him the said William, in the said court of record of our said lord the king, called the Supreme Court of Judicature, held for our said lord the king at the said town of St. Jago de la Vega, in the said county of Middlesex, in and for the said island

The rate of interest to be calculated on a claim wrongfully withholden, is according to the laws of the country where the debt was contracted, and is not governed by the amount of the interest allowed in the country where the debt is sued for; hence in an action on a bill of exchange, drawn in Bermuda, on a person in England, and also payable in England, the plaintiff recovered 7 1-2 per cent. being the rate of interest in Bermuda; *Dougan v. Banks*, Chit. on Bills, 6th edit. 423; see *post*, tit. Interest.

Property in fee, in the colonies, is subject to debts, and considered as a chattel till the creditors are satisfied, when the lands shall descend to the heir; see 11 Vin. Ab. 28; 2 Vent. 358; 4 Mod. 226; 4 Burn, Ecc. L. 195; 3 Ves. jun. 118, Toller's Executors, 417. And by the stat. 5 Geo. 2. c. 7. s. 4. it is enacted, that houses, lands, negroes, (repealed as to negroes, 37 Geo. 3. c. 119.) and other hereditaments and real estates situate within any of the British plantations in America belonging to any person indebted, shall be liable to, and chargeable with, all just debts, duties, and demands, of what nature or kind soever, owing by any such person to his majesty, or any of his subjects, and shall be assets for the satisfaction thereof, in like manner as real estates are liable to the satisfaction of debts due by bond or other specialty, and shall be subject to the like remedies, proceedings, and process, in any court of law or equity, in any of such plantations respectively, for seizing, extending, selling, or disposing, of any such houses, lands, negroes, and other hereditaments and real estates, towards the satisfaction of any such debts, duties, and demands, and in like manner as personal estates in any of the said plantations respectively extended, sold, or disposed of for the satisfaction of debts.

[551] of Jamaica, and within the jurisdiction of the said court, before the Honourable Thomas Beach, Esq. chief judge of the said court, and his associates, then sitting judges of the same court, as the said plaintiffs have, in the said first count of their said declaration, alleged; and that he is ready to verify; wherefore, &c." There was a similar plea to the second count. Upon the *nil debet* the plaintiffs took issue; and the trial coming on at the sittings in Westminster Hall, after Easter Term 1778, a verdict was found for the plaintiffs. To the pleas of *nil tiel record*, &c. (in the words of the pleas; and this they the said plaintiffs are ready to verify by the said record; and thereupon a day is given to the said plaintiffs, on, &c. to come before our said lord the king, wherever, &c. to produce the said record, and the same day is given to the said defendant." In Trinity Term, 18 G. 3. these issues in law came on to be argued, the judgment on which the action was brought having been brought into court, under the seal of the Court of Jamaica.

Lord Mansfield now, and on the former occasion, said, that the plea of *nil tiel record* was improper. Though the plaintiffs had called the judgment a record, yet, by the additional words in the declaration, it was clear they did not mean that sort of record to which implicit faith is given by the Courts of Westminster Hall. They had not misled the Court nor the defendant, for they spoke of it as a record of a court in Jamaica. The question was brought to a narrow point, for it was admitted on the part of the defendant, that *indebitatus assumpsit* would have lain; and, on the part of the plaintiffs, that the judgment was only *prima facie* evidence of the debt. That being so, the judgment was not a specialty, but the debt only a simple contract debt; for *assumpsit* will not lie on a specialty. The difficulty in the case had arisen from not fixing accurately what a court of record is in the eye of the law. The description is confined properly to certain courts in England, and their judgments cannot be controverted. Foreign courts, and courts in England, not of record, have not that privilege, nor the courts in Wales, &c.; but the doctrine in the case of *Sinclair v. Fraser*, cited in the *Duchess of Kingston's case*, p. 64. was unquestionable. Foreign judgments are a ground of action every where, but they are examinable.

8. *MOLONY v. GIBBONS*. M. T. 1810, N. P. 2 Campb. 502.

Action on a judgment obtained in Jamaica, containing the following entry: "J. G. by J. H., his attorney, comes and defends the wrong and injury, when, &c." For the defendant it was contended that the plaintiff was bound to prove that the attorney had been duly authorised to appear.

Per Lord Ellenborough. I must assume that the attorney had authority to appear, or that the defendant was living within the jurisdiction. We must give credit to the judgment for facts specifically alleged. See *Buchanan v. Rueker*, 9 East, 192; abridged ante, p. 544; 1 Camb. 63; 1 Stark. 525; 3 Wils. 297. 304; 2 Stark. 183.

9. *APPLETON v. LORD BRAYBROOK · BLACK v. SAME*. M. T. 1816. 2 Stark. 6.

In support of an action on a judgment in the Supreme Court of Jamaica, the following evidence was adduced: 1st, a certificate by the governor, under the seal of the island, that G. C. was a secretary of the island, and notary public; 2dly, a certificate by G. C., as notary public, that A. D. was clerk of the court; 3dly, a document, purporting to be a copy of a judgment in the Supreme Court of the island, under the seal of A. D. It was also proved that the clerk of the court had no regular seal of office, and that the alleged copy was in the hand-writing of C. J. who was in the habit of writing all such documents, and who was the clerk of A. D., and that A. D. was the nominal clerk of the court in the absence of S. It appeared also that a new practice had

* In general, to prove a colonial judgment, it must either be authenticated by proving the seal of the foreign court, or evidence must be given that the court has no seal; and in evidence then the judgment may be established, by establishing in evidence the signature of the judge. If there be an official seal belonging to the Court, it should be used for the purpose of authenticating its judgments, and should be proved by a person acquainted with the impression; see *Henry v. Adey*, 3 East, 221; *Alves v. Baubury* 4 Camp. 28; *Cavon v. Stewart*, 1 Stark. 525; *post*, tit. Judgment.

A copy of a judgment in the Supreme Court of Jamaica, made by the chief clerk, can not be read in evidence in this country, altho' it appear

lately been adopted, and that S., the chief clerk, had taken out with him a seal that such copies are to be used in future as the seal of the court.

It was objected that this was not a sufficient authentication of the judgment; and on motion to set aside a verdict for the plaintiff. Lord Ellenborough said: I entertain no doubt that this copy is inadmissible. It has been admitted, that it is the mere authenticated copy of the officer, and not an exemplification. Is there any instance where the courts have regarded such an instrument as receivable in evidence? An exemplification under the seal of the court is certainly admissible; but it is argued, that because there is no seal of the court, this is to be considered as an exemplification. But it is, in fact, in the nature of an office copy, and it has not been proved that the practice of receiving such copies in evidence has ever extended beyond the limits of the island. Such proof is indispensably necessary to show that an instrument in this form is admissible here. If, for want of a seal, the document cannot be clothed in the same form with legal exemplifications, it must be proved to possess some requisites to entitle it to credit. On account of the great distance of this island, it would be of enormous inconvenience to relax the rule of evidence. Office copies of this nature may be receivable in the island, in the same manner as office copies are receivable here, where a question arises in the same court, but which would not be admissible in any other court. It does not appear that any court beyond the limits of the island has given credit to such a document, and it would be very dangerous to relax the rules of evidence.

10. CLEGG. v. LEVY. M. T. 1812. 3 Campb. 166.

Action on a contract made in Surinam for the price of goods sold. It was objected that, according to the law of that state, the agreement ought to have been stamped; to prove which, a merchant, who had resided in the colony, was called; but he having admitted that there was a written law upon the subject, Lord Ellenborough said: I must have more distinct evidence of the law of Surinam before I reject this contract as inadmissible for want of a stamp. The law being in writing, an authenticated copy of it ought to be produced. See 3 East, 381; 1 East, 515; 2 East, 261.

11. BURN v. COLE. 1762. Cited in HUNTER v. POTTS. 4 T. R. 185.

This was a case before the privy council, at which it was determined that where a testator domiciled in England died, the judge of the probate in the plantations was bound by the probate granted here. See 2 Ves. 35; Pipon, Ambler's Rep. 25; Munroe v. Douglas, 5 Madd. Ch. 479.

COLOUR BOOK. See tit. *Calico Printer.*

COLOUR IN PLEADING. See tits. *Declaration; Pleas; Replication; Rejoinder.*

COLOURABLE POSSESSION. See tits. *Ejectment; Vendor and Purchaser.*

COMBINATIONS. See tits. *Conspiracy; Conviction; Master and Servant.* For the statutes relating to combinations, see 39 Geo. 3. c. 79. s. 1; 5 Geo. 4. c. 95; 6 Geo. 4. c. 129.

COMMENCEMENT OF ACTION. See tits. *Penal Action; Process.*

COMMENCEMENT OF WAR. See tit. *Gazette.*

COMMERCE. See tit. *Trade.*

COMMISSION. See tit. *Principal and Agent.*

COMMISSION OF BANKRUPTCY. See tit. *Bankrupt.*

* And in case of bankruptcy, and a commission issuing against a trader in this country, all his personal property in the plantation vests in his assignees from the time of his bankruptcy; and therefore, if a creditor having notice of a bankruptcy, and all the parties being resident in England, and the debt contracted in it, avails himself of the process of the law of England, as by making an affidavit of his debt to proceed by attachment against the bankrupt's effects in one of the colonies, or even in any independent state, and obtain judgment and execution, he cannot retain the money levied from the assignees; see *Hunter v. Potts*, and *Still v. Worwich*, *ante*, vol. 3. p. 808; and see *ante*, vol. 3. p. 689. and n.

When necessary to prove the laws of the colony, an authenticated copy (if in writing) must be produced; if not, it must be established by the testimony of a witness conversant with the law.

553 | If a British subject domiciled in England dies here, a probate granted by the Prerogative Court, will bind property in the colonies.*

[554] **COMMISSION DAY AT NISI PRIUS.** See tit *Abatement*.

COMMISSION MILITARY. See tit *Army*.

COMMISSIONERS. See tits *Affidavit*; *Bankrupt*; *Customs*; *Excise*; *Inclosure*; *Insolvent Debtors*; *Lunatic*; *Navigation*; *Roads*.

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I. RELATIVE TO THE OFFENCE FOR WHICH A PARTY MAY BE COMMITTED.

(A) IN GENERAL.

All persons who are apprehended for offences which are liable, must find bail, or be committed; 2 Hawk. P. C. 180. As to what offences are not bailable, see *ante*, vol 3. from p. 302 to 344. Where a justice of the peace is empowered by any statute to bind a person over, or to cause him to do a certain

act, and such person being in his presence shall refuse to be bound, or to do such act, the justice may, it seems, commit him to gaol, to remain there until he complies; see 2 Hawk. P. C. 180. Indeed the power to commit for immediate contempt, must be viewed as incident to every tribunal possessing jurisdiction over the cause or subject of complaint; see *post*, Div. II. [556]

(B) IN PARTICULAR.

1. *REX V. CARROCKE*. E. T. 1692. K. B. 1 Show. 395.

The defendant was committed by justices in pursuance of a warrant by them, reciting that defendant and others, overseers, had been duly summoned to appear to show cause why they had not rendered an account of moneys received and paid by them to the use of the poor; that the defendant had appeared; and being demanded to give a just and true account, and to account in gross, of the receipt and payments, and the defendant refusing to give such an account, as directed by 43 Eliz. c. 2., they deemed it expedient to commit him, to be detained until he gave a true and explicit account. Upon a *habeas corpus* for his discharge, the Court said the justices had no authority to commit. See *post*, tit. Overseer; Poor Rate. Justices under the 43 Eliz. c. 2. cannot commit an overseer for refusing to give an account of moneys received in detail instead of in gross.

2. *REX V. WEST*. E. T. 1701. K. B. 11 Mod. Rep. 59; S. C. 6 id. 180; S. C. 2 Ld. Raym. 1157. S. P. REG. V. SIMMONS. M. T. 1707. K. B. 11 Mod. 136.

The defendant had an order made on him by two justices of peace, for the maintenance of a bastard child; he appeared to the general quarter sessions, who confirmed the order, and committed him for disobedience of their order. He was brought into this court by *habeas corpus*, and it was moved that he might be discharged; for that the justices ought not to have committed him, an order of but to have proceeded on his recognizance; in which opinion the Court seemed to concur. See 2 Bulst. 341; Cro. Eliz. 108; Cro. Car. 464. Nor the justices at sessions for disobeying an order of filiation.

3. *BALLARD V. GERARD*. M. T. 1701. K. B. 1 Ld. Raym. 703; S. C. Holt, 596; S. C. 12 Mod. 608; S. C. 1 Salk. 333.

In this case it was contended that persons refusing to pay fees due to the officers of court were liable to be committed. But the Court said, they knew of no such practice, and that they could not commit a man for not paying fees. If there be any right, there is a remedy; and *indebitatus assumpsit* will lie if the fee is certain; if uncertain, *quantum meruit*. Or even the Court of K. B. for non-payment of the fees.

4. *CLARK'S CASE*. M. T. 1696. K. B. 5 Mod. Rep. 319; S. C. 12 Mod. 113; S. C. 1 Holt, 430; S. C. 1 Salk. 349; S. C. 3 Salk. 92; S. C. 1 Com. 24; S. C. Comb. 411.

This case came before the court on a return to an *habeas corpus*; which set forth the charter of the city of London, &c. and that in the said city where are several companies, &c., and that the company of vintners is one of them, &c., and that those companies are under the government of mayor and aldermen; and they say also, that if a man refuses to take on him the office of a liveryman of any company, he might be thereof convicted and imprisoned by the mayor and aldermen; and they say, that Clark refused to take on him the office of a liveryman of the company of vintners, though he was a citizen and freeman of London, and subject to the same; and that therefore the mayor and aldermen committed him to F. the keeper of Newgate, until he should take on him the said office. But a free man of London may be committed by the court of Alder men for non-payment of a fine imposed on him for not taking up his livery. The Admiralty Court may commit.

The Court said: we ought, as far as we can by law, to support the government of all societies and corporations. and especially this of the city of London; and if the mayor and alderman should not have power to punish offences in a summary way, it would be very prejudicial.

But it does not set out that F. is an officer, though we confess he is an officer to the sheriffs, as he keeps the county gaol; but it ought to have appeared, that he was committed to an officer of the mayor and aldermen.

Clark was afterwards discharged by the whole Court, who declared their opinion, that the custom was a good custom, and was for the advantage and good government of the city, and therefore they would always support it.

II. RELATIVE TO WHO MAY COMMIT.

(A) AS TO THE HOUSES OF PARLIAMENT.

The House of Peers and House of Commons may commit for contempt; see *ante*, vol. 3. p. 322 and *post*, tit. Parliament.

(B) AS TO THE KING'S BENCH.

See *ante*, vol. 3. p. 322 to 329.

The Court of King's Bench may commit; therefore, where bail, on coming up to justify, were guilty of gross prevarication, they were committed; see 1 Chit. Rep. 116; Cro. Car. 146; Petersdorff on Bail, 321.

(C) AS TO THE COMMON PLEAS AND EXCHEQUER.

See *ante*, vol. 3. p. 334.

The Common Pleas and Court of Exchequer may commit for contempt.

(D) AS TO THE ADMIRALTY COURT.

2. KEARH'S CASE. T. T. 1702. K. B. 1 Salk. 352; S. C. 2 I.d. Raym. 789.

A *habeas corpus* issued to remove A. B. from the prison of the Admiralty, where he was confined in execution upon a sentence. Upon the writ being returned it was moved that he might be committed here, for that there was no other way to sue him, since he was not chargeable in the prison of the Admiralty. But the Court said, though the proceeding of the Admiralty was by the civil law, yet it was supported by the custom of the realm, and that the Court of K. B. could not therefore interfere.—Defendant remanded.

(E) AS TO THE PRIVY COUNCIL AND SECRETARY OF STATE.

[558]
The Privy
Council,

1. REX. V. DESFARD. T. T. 1798. K. B. 7. T. R. 736.

Upon a *habeas corpus* it was moved that the warrant of commitment, committing the defendant for treasonable practices, signed by the Privy Council, might be quashed. But the Court refused the application.

2. REX V. KENDAL. M. T. 1695. K. B. 5 Mod. 81; S. C. 12 Mod. 82; S. C. Comb. 943; S. C. Skin. 596; S. C. 4 St. Tr. 854; S. C. 1. Salk. 347; S. C. Holt, 144.

Secretary
of State,

The defendants being brought up by *habeas corpus*, it appeared by the return that they had been committed by one of the Secretaries of State, for assisting in the escape of A. B. in custody for treason. On motion for their discharge, on the ground that the commitment was illegal, because a secretary of state is no justice of the peace, and as a secretary of state he cannot take a recognizance to prosecute, and therefore it is unreasonable that he should have power to commit. But the Court overruled the objection.

(F) AS TO THE BOARD OF GREEN CLOTH.

ELDERTON'S CASE. T. T. 1703. K. B. 2 Ld. Raym. 978; S. C. 6 Mod. 73; 3 Salk. 91; Holt. 599.

And Board
of Green
Cloth may
commit.

E. was committed by the Board of Green Cloth for executing a *feri facias* in Whitehall, and on the return of a *habeas corpus* it was argued to be lawful, and not at all prejudicial to the privilege of the palace, and that they had no power to commit for breach of the peace, having a power only over the queen's family, for the government of the menial servants, and that the privilege of Whitehall was confined to the jurisdiction described in the stat. 28 H. 8.

Per. Cur. The privilege of the palace is by common law, and that in respect of the king's presence; now if the queen was totally absent, and neither present by herself, or by any of her domestics or family, the place has no privilege; but it is otherwise where it was only a personal absence for a little time. See *Winter v. Miles*, 10 East, 581; S. C. 1 Campb. 475, n.; and 4 Co. 46; 3 T. R. 740.

(G) AS TO JUSTICES OF THE PEACE See also 7 Geo. 4. c. 64; 60 Geo. 3. c. 14; and 7 Geo. 3. c. 38.

[559]
A justice of
the peace
may com-
mit.

1. ANON. C. T. 1705. K. B. 11 Mod. 45.

A man removed into K. B. by *habeas corpus*, upon a commitment by a justice of the peace, having a recognizance of the cause, is not bailable untill the order is quashed, because till then he is in execution.

But a com-
mitment by
one justice

2. FRANKLIN'S CASE. M. T. 1670. K. B. 1 Mod. 68.

F. being brought up by *habeas corpus*, and the return being read it appear-

ed that he was committed on the 17 Car. 2. c. 2. as a preacher at seditious conventicles. F prayed his discharge on the ground that the 17 Car. directed the commitment to be done by *two justices* of the peace, and whereas this was by one only And on that ground the court discharged.

3. *REX v. KIMBERLEY*. M. T. 1729. K. B. 2 Stra 848.

The defendant was brought up by *habeas corpus*, being committed for feloniously marrying B R., contrary to an Irish act of parliament, 6 Ann., in order to be sent over to Ireland to be tried, the offence being committed there. On motion that he might be discharged, it was insisted that justices of the peace in England are confined to act only as to such offences as are against the laws of England, and committed in England, and that the proviso in the *habeas corpus* act gives no power as to offences in Ireland, but leaves it on the former practice. *Per Cur.* It has been done in Col. Lundy's case, 2 Vent. 314; and in 3 Keb. 785, the Court refused to bail a man committed for murder in Portugal. If application is not made to have him sent over in a reasonable time, you may apply again: and thereupon the defendant was remanded.

H. AS TO COURTS OF ALDERMEN.

HARWOOD'S CASE. M. T. 1671. K. B. 1. Mod Rep. 77 79; S. C. 2 Lev. 32; S. C. Tremain, 420; S. C. 2 Keb. 817; S. C. 1 Vent. 178.

H. was brought up by *habeas corpus*, being committed by the Court of Aldermen for marrying an orphan without their consent. But the Court remanded him, saying, that Mr. Waller had been imprisoned six months for a similar offence.

III. RELATIVE TO THE TIME OF THE COMMITMENT.

BIDDLE v. USTONSON. H. T. 1814. K. B. 2 Chit. Rep. 139.

This was an application that the defendant might be committed for the non-payment of certain penalties, under the 12 G. 2., which directs that after judgment, if the defendants does not pay the amount of his penalties, he shall be committed for three months by the court in which judgment is recorded. But the Court thought that the plaintiff, having proceeded by action, was bound to go on to execution before he could call for such commitment. fault of payment of certain penalties, cannot, when sued, be committed for such non-payment, until plaintiff has proceeded to execution.

on a statute which directs it to be done by two, is illegal.

Justices have a power to commit any person in this country who has offended against the laws of Ireland, in order to be sent over there to take his trial.

The Court of Aldermen may commit for marrying a city orphan without their consent.

[560] A defendant rendered liable to be committed on de-

IV. RELATIVE TO WHAT IS TO BE DONE PREVIOUS TO THE COMMITMENT.

1. *REX v. BITHELL*. T. T. 1695. K. B. 1 Ld. Raym. 48; S. C. Holt, 145; S. C. 1 Salk. 348; S. C. 5 Mod. 19. S. C. 12. ib. 74.

The defendant had been committed for non-payment of a fine. It was objected, that it did not appear from the examination that B. was present in court, and that he could not be committed in his absence; and the court entertained the same opinion.

2. *REX v. ANGELL*. T. T. 1726. K. B. Ca. Temp. Hard. 124.

The justices had a petty sessions to search after vagrants, and a poor man residing in the parish of B. being examined, confessed himself to be settled in the parish of S., whereon the justices ordered him to be removed to S.; but the pauper returned the same day to B., pretending to be an hired servant to a parishioner of B., whereon the defendant, who was a justice of peace for B., and was present at the petty sessions, without any summons, or oath made of his return, committed the pauper to the house of correction, where he was kept three days; and on this the Court was moved to grant an information against the defendant. The Court allowed the proceedings of the petty sessions in this case to be irregular, because there was no complaint made of his being chargeable, or likely to become chargeable to the parish of B.; but yet as that was only a mistake of judgment, the Court would not have thought it worthy of punishment; but the sending him to the house of correction was punishing him, after having convicted him unheard, and that being contrary to natural justice, granted the information.

Previous to committing a man, his presence must be procured.

Committing a pauper to the house of correction without any sum after his return, after removal, is illegal.

[561] V. RELATIVE TO THE PRISON WHERE THE OFFENDERS
MAY BE COMMITTED TO,* AND THE MANNER OF
COMMITTING.†

It seems
questiona-
ble whe-
ther a com-
mitment
can be to
any other
place than
the com-
mon gaol;

1. *REX v. KENDAL*. M T. 1694. K. B. 1 Ld. Raym.; S. C. 1 Salk. 347.

It was contended, and admitted by the Court, that though generally commitments ought to be to the common gaols, yet it is a question if commitment to another place than the common gaol would make the commitment void. Justices of the peace ought not to commit to the new prison for felonies, &c.

2. *Ex parte EVANS*. H. T. 1799. K. B. 8 T. R. 172.

But a house
of correc-
tion is a
gaol to
which a pri-
soner char-
ged with
high trea-
son may be
commit-
ted. §

A rule was obtained calling upon the governor of the house of correction for the county of Middlesex, to show cause why a writ of *habeas corpus* should not issue, commanding him to bring up the body of T. E. It appeared from a copy of T. E.'s commitment, that he was committed to the house of correction for high treason, to be kept safe and close till he should be delivered by due course of law, by virtue of a warrant issued by one of his majesty's principal secretaries of state. The ground on which the rule was prayed was, that a house of correction was not a legal place of custody for persons under a charge of high treason. But the Court, after taking time to consider, said they had looked in the statutes relating to houses of correction, and did not think that the regulations insisted on, apply so as to make a house of correction an improper place of confinement for safe custody. And after the practice had prevailed for so long a time, they saw no objection to the legality of the present commitment. Rule discharged.

3. *REX v. WALL*. H. T. 1697. K. B. 1 Ld. Raym. 424.

And the
Tower is a
legal gaol
for such pri-
soners.

Holt, C. J. said, that a commitment to the lieutenant of the Tower for high treason is valid, according to the precedents.

VI. RELATIVE TO THE FORM OF COMMITMENT.

(A) GENERAL REQUISITES.

1. *STILL v. WALL*. T. T. 1806. K. B. 3 Smith's Rep. 513.

[562]
An order of
commit-
ment may
be by pa-
rol; and a
verbal com-
mitment by
justices un-
til the ef-
fect of a
warrant of
commit-
ment for a
penalty be
known, has
been hold-
en good. ||

Trespass for false imprisonment. An information was preferred against the plaintiff before a magistrate, upon the statute 13 G. 3. c. 80. for having sold goods on a Sunday, and the plaintiff was convicted in a penalty of 40s. The justice then ordered the defendant, who was a constable, *verbally* to keep the plaintiff in custody until the effect of a warrant of distress, which was issued for the penalty, should be known. The statute enacts, that if the party shall be convicted, the penalty shall be forthwith paid, and in cases of neglect the justice by his warrant shall cause the same to be levied by distress and sale; and it shall be lawful for the said justice to order the defendant to be kept in safe custody till it shall appear that the same is paid. Upon this evidence there was a verdict for the plaintiff. A rule was obtained to show cause why a nonsuit should not be entered. *Per Cur.* The rule must be made absolute. If there is any portion of time for which a justice can commit, as, for instance,

* The prison ought to be within the kingdom; see 31 Car. 2. c. 12; and a common gaol; see 24 Geo. 3. c. 85.

† The commitment should be directed to the keeper of the prison, and not to the party conveying the offender; see 2 Hawk. P. C. 135. The magistrate's commitment at the police offices for the metropolis is merely directed to the gaoler; but in other counties it is usually addressed to a constable, and to the keeper of the gaol, commanding the former to convey the prisoner into the custody of the latter, and the latter to receive and keep him; see Burn's J. tit. Commitment.

‡ And by the 11 & 12 W. 3. and 5 Hen. 4. all murderers shall be imprisoned in the common gaol, and not elsewhere.

§ And by the 6 Geo. 1. c. 19. all persons charged with small offences may be committed to the house of correction, or to the common gaol; but the party must be committed to the proper prison in the first instance; and if he be not, his removal must be by *habeas corpus*, on pain of 100*l.* for the first offence, and 200*l.* for the second.

|| But every final commitment must be in writing under the and hand seal of the person by whom it is made, expressing his office or authority; see *post*, 563; time and place at which it is made, and must be directed to the gaoler or keeper of the prison; see *post*, 565; see 2 Inst. 52; 2 Hale, P. C. 122; Dalton, J. C. 125; 5 Burr. 2686. And it may be either in the name of the king, or in that of the prosecutor; see Dalton, C. J. 125.

while he is making out a warrant, it must empower him to commit absolutely by parol. We order the commitment of offenders by parol, though a general order is afterwards drawn out.—Rule absolute.

2. REX N. PLATT. Feb. Sess. 1777. Old Bailey. 1 Leach, C. L. 157.

Abridged more fully *ante*, vol. iii. p. 336.

On a *habeas corpus* to discharge the defendant, on the ground that the commitment was bad. The Court said, a commitment must contain *convenient* certainty; and therefore, it is not necessary to allege that the charge was made upon oath, for commitment may be *super visum*, and then an oath is unnecessary. See 5 Mod. 78; 1 Stra. 2; 2 Wils. 158.

And it need not state the charge to have been on oath, but it must be convenient ly certain.

(B). PARTICULAR REQUISITES.

(a) *As to its stating the titles of statutes.*

REX V. HARPUR. E. T. 1822. K. B. 1 D & R 222.

It was urged in this case that though a commitment stated an offence to have been committed "contrary to a certain statute made and passed in the first year of the reign of George the fourth," it should have set forth the title of the act, because it was impossible to know on what statute the commitment was founded. But *Abbot, C. J.* held that the commitment need not mention the title of the statute.

A commitment on a particular statute need not mention its title. [563]

(b) *As to its stating the authority to commit.*

1. REX V. GOODALL. E. T. 1754. K. B. Sayer, 129; S. C. 1 Kenyon 122.

Upon motion to discharge the defendant, who had been committed for having riotously assembled with divers others, it was contended that it did not appear in the warrant that the person committing was a justice of the peace; or that he had authority to commit the defendant. But the court were of opinion that it was not necessary that an authority to commit should appear in a warrant of commitment.

Formerly the authority to commit need not have been stated in the commitment.

2 REX V. YORK. M. T. 1771. K. B. 5 Burr. 2684. S. P. CLARK'S CASE. M.

T. 1694. K. B. Comb. 305.

The defendants being brought up by *habeas corpus*, it appeared, from the return of the governor of Bridewell, that the defendants were committed by Sir J. F. knight, one of his majesty's justices of the peace for the city and liberty of W. by a warrant, as follows; "Westminster, to wit—To the governor of Tothill-fields, bridewell, or his deputy. Receive into your custody the bodies of Frances York and Jane Fielding, and others herewith sent you; brought before me by Wm. Manning and other constables, and [&] convicted upon the oath of Wm. Haliburton, one of the constables of the parish of St. Paul, Covent-Garden, for being loose, idle, disorderly persons, of evil fame, and common night-walkers, against the statute, &c., them to hard labour, until the next general quarter sessions of the peace, therefore safely keep in your custody; or until they shall be discharged by due course of law. Given under my hand and seal, this 23d day of November 1770." The return did not add any name at all, subscribed at the bottom of the commitment; but the name "J. Fielding," was set in the margin over the *locus sigilli*, and so it was in the original warrant. The exception taken to the commitment was, that the warrant of commitment did not show that Sir John Fielding, who made it was a justice of peace, or had power to commit these persons. Lord Mansfield observed, that this was upon a conviction; and it ought to be shown that the person convicting had authority to convict. It is a commitment in execution; and the authority of the person committing them ought to be shown; whereas, here it does not even appear by whom they were convicted; it is only said in the warrant, "brought before me and convicted." The not showing before whom they were convicted is a gross defect. Let them be discharged.—Defendants discharged.

But now a different rule seems to obtain, especially upon a commitment in execution.

[564] Therefore a commitment in pursuance of a writ de *con tumace capiendo*, which stated that defendant was committed for non payment of costs, in a

3. REX V. DUGGER. E. T. 1822. K. B. 5 B. & A. 791; S. C. 1 D. & R. 460.

This was an application for a *habeas corpus* to bring up the defendant, in order that he might be discharged out of custody, on the ground of a defect in the warrant of commitment. It appeared on the face of the warrant, that he

cause of appeal, and complaint of nullity was committed for contumacy in not paying the taxed costs in a cause of appeal, and complaint of nullity, then lately pending in the Arches Court of Canterbury, and it was contended that this did not sufficiently show that the cause was one of ecclesiastical jurisdiction, and that the warrant should have gone on to describe the nature of the suit. The Court acquiesced in this argument, and said: this writ *de contumace capiendo* was first given by stat. 53 G. 3. c. 127. and thereby made subject to all the rules and regulations applying to the former writ, *de excommunicato capiendo*. Now the principle to be collected from the several decisions upon that writ is this, that the party was condemned in costs, in a suit respecting a subject matter apparently within the jurisdiction of the Ecclesiastical Court. See 2 Mod. 1047. 1189. 2 Ld. R. 790; S. C. 817; S. C. 7 Mod. 56. 117; 1 Salk. 29. 273. 294.

4. COL. LAYTON'S CASE. E. T. 1705. K. B. 11 Mod. Rep. 47. 59. 236; S. C. Fort. 173; S. C. 1 Salk. 166. 353. 450; S. C. 1 Salk. 353.

The defendant was brought into court by a *habeas corpus*, having been committed by the Lord Mayor of London for a forcible entry into the Fleet prison, and a forcible detainer thereof. The title L. claimed by was, that this prison was, by a judgment of this court, seized in the queen's hands under whom he claimed. And the exception taken was, that it did not appear that a commitment was made by a justice of peace; for the subscription was by Owen Buckingham, mayor, and did not say justice of peace, it is necessary that the person who commits for a forcible entry should entitle himself to a jurisdiction, by subscribing himself a justice of the peace. But the Court said, that this objection of his signing mayor and not justice, was untenable; for that defect was supplied by the 6 Hen. which makes all mayors justices.

But a commitment by a Lord Mayor of London, with out adding, "and justice of the peace," sufficiently shows his authority. If in the warrant of commitment a wrong name is mentioned, as that of the witness, upon whose oath the conviction was made, it is surplusage, as the formal conviction may in all cases be drawn up at any time afterwards.

(c) *As to its stating the name of prosecutor, witnesses, and prisoner.**

MASSEY V. JOHNSON. H. T. 1810. K. B. 12 East, 67.

The warrant of commitment in this case was expressed upon the face of it to have been made upon the information on oath of J. S. The allegation was shown by the evidence to be false, (inasmuch as it was on the oath of W. B.) which was, it was suggested by the Court, thereby rendered difficult to refer to a legal and valid conviction, which must be presumed to have proceeded upon a true fact; and contended by counsel rendered the whole proceedings illegal, both in fact and in law. But the Court afterwards abandoned their view of the case, and said: the mis-recital in the warrant of commitment of the name of the party through the medium of whom the conviction in question took place, may be rejected as surplusage, and then the rest of the commitment will stand good. After a conviction in fact the magistrate was authorised to commit the plaintiff, and the conviction might be (as has been done in this case) drawn up in form at a future time.

made, it is surplusage, as the formal conviction may in all cases be drawn up at any time afterwards.

[565]

Even altho' the penalty incurred has been previously levied by distress.

The warrant must state to what gaol the offender is committed.

2. REX V. BARKER. H. T. 1800. K. B. 1 East, 186.

In this case the Court refused a criminal information against a magistrate for returning to a writ of *certiorari* a conviction of a party in another and more formal shape than that in which it was first drawn up, and of which a copy had been delivered to the party convicted by the magistrate's clerk; the conviction returned being warranted by the facts, although it was urged that such practice was productive of much inconvenience, and in the very case before the court had induced the defendant to incur the expence of prosecuting a writ of *certiorari* in order to relieve himself from the liabilities incident to such proceedings.

(d) *As to stating the prison where the offender is committed to.*

1. REX V. SMITH. T. T. 1723. K. B. 2 Stra. 934.

The defendant was brought up by *habeas corpus*, and appeared to have been committed for want of sureties in an action in the vice-chancellor's court, at Oxford, of injury and damage, to the value of 1000l., and, by warrant, the beadles of the university were required to carry him to prison; and now, on

* The commitment should contain the name and surname of the party committed, if known; if not known, then it will be sufficient to describe the person as accurately as may be convenient, and to add that he refuses to tell his name; see 1 Hale, P. C. 557.

motion, he was discharged: because the warrant was not directed to any gaol-er, but was only generally to carry him to prison. But a commitment to prison means to the keeper of the prison.

2. **WRIGHT V. GAMBIER.** M. T. 1734. C. P. Prac. Reg. 92. S. P. **REX V. FELL.** H. T. 1698. K. B. 1 Id. Raym. 424; S. C. 1 Salk. 272.

In an action against the warden of the Fleet for an escape, the court were of opinion, that a commitment to the prison of the Fleet was the same as a commitment to the warden of the Fleet.

(c) *As to its stating the time of imprisonment.*

1. **REX V. JAMES.** T. T. 1822. K. B. 5 B. & A. 894; S. C. 1 D. & R. 559.

S. P. **REX V. HALL.** H. T. 1695. K. B. 3 Burr. 1636.

The defendant in this case had been committed by two justices for a contempt towards them in their office, until discharged by due course of law. He was now brought up under the *habeas corpus* act, and discharged, the Court being clearly of opinion that the commitment was bad, as it ought to have been for a time certain; and as there was no course of law by which the defendant could be discharged, such a commitment, if valid, amounted to perpetual imprisonment. See 2 Hawk. P. C. c. 1. s. 16; 3 Mod. 139; Salk. 698; S. P. 420; Peach, N. P. C. 62; 7 Taunt. 63; Vaughan, 138; 4 B. & A. 218. A commitment for punishment must be for a time certain. [566]

2. **DR. GROENVELT'S CASE.** E. T. 1697. K. B. 1 Id. Raym. 213. S. P.

VOXLEY'S CASE. E. T. 1702. K. B. 1 Salk. 351.

G. being committed by the censors of the College of Physicians, was brought into court by *habeas corpus*, on which the gaoler returned, that the said doctor being examined last vacation, and convicted by the censors of the College of Physicians for his ill practice on the body of J. S., in the year 1692, by which the said J. S. died, was fined by the said censors 20l. and committed to gaol, until he should be delivered by the said college, or otherwise by due course of law. Therefore a commitment until the offender be delivered by due course of law;

On which return the Court resolved, that the sentence or judgment was too general, for the cause of commitment ought to be certain, to the end that the party may know for what he suffers, and that he may regain his liberty; if he was committed for the fine, it ought to be until he paid the fine; but if the intent of the censors was to punish him, not only by fine, but also by imprisonment, they ought to have made them two distinct parts of the judgment, by condemning him to prison for so long, and from thence until he should pay the fine.

3. **REX V. BARNES.** M. T. 1723. K. B. 2 Stra. 917.

The defendant being brought up on an *habeas corpus*, it appeared that he was committed by the vice-chancellor of Oxford, for carrying goods between Oxford and London, without an university licence, there to remain till he gives security to carry no more, and to observe the statutes of the university for life. But a warrant of magistrates committing a parish clerk to gaol, there to remain until he had duly accounted and paid the sum due, requiring the gaol keeper to receive and keep him till discharged by due course of law. See 1 Salk. 351; S. C. 1 Id. Raym. 100; 1 Id. Raym. 99; 2 id. 851; S. C. 1 Salk. 351; 1 Burr. 602.

Per Cur. It is an illegal commitment; therefore he must be discharged.

4. **GOFF'S CASE.** M. T. 1814. K. B. 3 M. & S. 203.

A warrant of two justices committing the collector of the rates for the parish of R. to the county gaol, upon complaint against him for refusing to account and pay over the monies collected by him, adjudged that he should be committed to the gaol, there to remain until he should have made a true account; and until such money, as by the said account should appear to be remaining in his hands, should be paid by him or his sureties; and they required the keeper of the gaol to receive and safely keep him until he should be discharged by due course of law. It was now argued, that these latter words vitiated the warrant, no definite period being shown when the defendant would be entitled to be released. But the Court said, we must remand the prisoner: if there was any uncertainty on the face of the commitment, we would not have come to such a determination. But coupling the premises with the conclusion, is it not in effect the same as if the warrant had directed the gaoler to detain the party until he had accounted? When the party has accounted, and paid over the money, he will be entitled to be discharged by due course of law. See 1 Salk. 351; S. C. 1 Id. Raym. 100; 1 Id. Raym. 99; 2 id. 851; S. C. 1 Salk. 351; 1 Burr. 602. Or a commitment till the offender gives security, is too general; But a warrant of magistrates committing a parish clerk to gaol, there to remain until he had duly accounted and paid the sum due, requiring the gaol keeper to receive and keep him till discharged by due course of law, was holden good.

[567 And a commitment "till the offender pay a sum of money" is good's

5. SWINSTEAD v. LYDALL. M. T. 1696. K. B. 5 Mod. 296; S. C. Skin. 664; S. C. 1 Salk 418; 3 id. 219.

An action of trespass and false imprisonment was brought by the plaintiff for detaining him in custody until he had paid 11s. for his deliverance.

The defendant pleaded the jurisdiction of the Court of Conscience in London, that they had power to make orders, and exact obedience to them. That an order by that court for the plaintiff to pay 10s. 4d. &c. which he not performing, the defendant took him by virtue of a precept of that court, and so justified the imprisonment, and detaining him till he had paid that sum. To this plea the plaintiff demurred, because the jurisdiction did not go to the whole sum of 11s. but only to 10s. 4d. After hearing counsel, the Court gave their opinion as follows:—This is a special authority given by act of parliament to this Court of Conscience to commit, &c. but the officer is not to detain the person in custody till the money is paid to him; for neither he nor the sheriff should receive it.—Judgment for the plaintiff.

A warrant of commitment under 1 & 2 G. 4. c. 148. s. 40.

(giving justices power upon summary conviction, to direct the penalty to go, one half to the receiver appointed by the act, and the other half as the justices shall direct; and in default of payment to commit for 2 months, unless the fine shall be sooner paid,)

was holden sufficient, altho' it did not state to whom the money was paid.

[568]

A commitment for a felony is sufficient, if it show a corpus delicti.

But where a defendant charged with cutting and spoiling and taking away a post out of a fence, was committed for wilfully and maliciously

the person in custody till the money is paid to him; for neither he nor the sheriff should receive it.—Judgment for the plaintiff.

(f) As to stating the distribution of a penalty.

REX v. ROGERS. H. T. 1822. K. B. 1 D. & R. 156.

By statute 1 & 2 G. 4. c. 118. s. 40. the penalties imposed by the same are directed to be distributed, one half to the receiver therein mentioned, and the other to such persons as the convicting justices shall direct; and it gives no appeal to the sessions. The defendant was committed under a warrant of execution (which recited that he had been convicted; for two months, or until he paid a penalty of 5l. for an offence under the 33d section of this act, without stating how the penalty was to be distributed, and to whom paid; which omissions, it was now argued on the defendant's being brought up on a *habeas corpus*, entitled him to be discharged out of custody. *Per Cur.* It is not suggested that the magistrate did not direct to whom the money was to be paid before the conviction took place; and as we are bound to presume that there was a good conviction before commitment, we think we ought not to discharge this defendant out of custody. The defendant is committed until he shall pay the penalty. If he pay to the gaoler, the latter is bound to discharge him out of custody before the end of two months; and the gaoler will afterwards take care to distribute the money properly according to the direction of the justice.

(g) As to its stating the offence.

1. In general.

1. REX v. CROCKER. E. T. 1815. K. B. 2 Chit. Rep. 138. S. P. REX v. JUDD. H. T. 1788. K. B. 2 T. R. 255; S. C. 1 Leach, C. L. 484; S. C. 2 East, P. C. 1018.

The defendant was committed for embezzling bank notes. The warrant of commitment did not state that the act was done *feloniously*; it was therefore conceived that the defendant was entitled to his discharge. *Per Cur.* A commitment need not have the precision of an indictment. The commitment states general evidence; and though not formally sufficient to find him guilty, yet it is sufficient, if the *corpus delicti* be shown to us to warrant the commitment. See 2 Wils. 158; 2 Hale, P. C. 122.

licti to warrant the commitment, tho' it do not state the act to have been done *feloniously*.*

2. REX v. HARPUR. E. T. 1822. K. B. 1 D. & R. 222.

It is no offence within the statute 1 Geo. 4. c. 56. "wilfully and maliciously to carry away" a post or pale, unless the party charged has wilfully or maliciously committed the damage injury, or spoil alleged. The charge against the defendant was for cutting, spoiling, and taking and carrying away a post out of a fence; and the commitment was only for wilfully and maliciously carrying the same away. On behalf of the defendant, it was contended that there was no offence within the 1 Geo. 4., nor within any other statute, stated on

* But it must contain the special nature of the felony; for where a commitment on the 7 Geo. 2. c. 21. charged that the defendant with "force and arms made an assault on, &c., with intent feloniously to steal, take, and carry away;" it was holden bad because the crime stated only amounted to a misdemeanor; Rex v. Remnant, 2 Leach, C. L. 583, abridged ante, vol. 3. p. 311.

the face of the commitment. *Per Cur.* The defendant is entitled to his discharge. He stands convicted of no offence whatever within the act in question. He is charged with cutting and spoiling, but his commitment is for carrying away. It is perfectly consistent with the statement in the commitment, that somebody else may have cut and spoiled the post; and that the defendant might have very innocently picked it up and carried it away. *Per Cur.* The defendant is not an offender in the statute, the enactments of which the defendant had infringed, the commitment was holden bad.

3. *REX V. WHITLOCK.* H. T. 1721. K. B. 1 Stra. 263.

The defendant being brought up from Newgate by an *habeas corpus*, it appeared on the return, that he had been committed for deer stealing. The statute 3 & 4 W & M. c. 10. authorises the committing of persons not having sufficient distress; an exception was taken to the warrant; because the justice only says, that it has been certified to him by the constable, that there was no sufficient distress, whereas there ought to have been a warrant to levy, and a return to that, that there was no distress; it may be the constable only told him so. *Per Pratt, C. J.* The warrant is well enough; as the word certified, imports it to be in a legal manner. But *Eyre, J.* being of a contrary opinion, the defendant was remanded.

Though it seems where power is given to a justice to commit for want of distress, if he state in his warrant that it is certified to him by the constable that there is none, it will suffice.

2. *In particular,*
1st. *For contempt.**

REX V. SANCHEE. H. T. 1697. K. B. 1 Ld. Raym. 323; S. C. Holt, 657; S. C. 12 Mod. 165.

The defendant and others, who were quakers, were cited into the Ecclesiastical Court, to answer there on their solemn affirmation, &c. concerning tithes withheld by them from the parson of the parish; and for not answering. The contumacy, according to the direction of stat. 27 H. 8. c. 20. certifies their contumacy to two justices of the peace, by whose warrant they were seized, and committed to prison; and being brought by *habeas corpus* it was moved that they might be discharged. *Per Cur.* The commitment ought to have stated what the ecclesiastical dues were; the parties are entitled to be discharged.

[569]
A commitment under 27 Hen. 8. for contempt in a suit in the Supreme Court for ecclesiastical dues, must state the kind of dues for which the party was sued.

2d. *For rescuing of goods and prisoners.*

1. *THE KING V. FRANKLIN.* K. B. H. T. 1783. 2 Leach, C. L. 255.

The prisoner had been committed under the 19 Geo. 2. c. 34. s. 1. by a warrant, which stated that he, with others, armed, had assisted in rescuing party who smuggled goods, and had maimed an excise officer. On a *habeas corpus* for his discharge, on the grounds that the commitment had not stated, 1st, that the prisoner was armed; 2d, that he was charged with any offence within the act. The judges held that to bring him within the act it was not necessary that he should be armed, since acting with armed persons was sufficient. Smuggled goods, need not state that the prisoner was armed; it is sufficient to allege that he did certain acts with others armed.

A commitment on the 89 G. 2. c. 34. s. 2. for rescuing

2. *REX V. KENDAL.* M. T. 1695. K. B. 1 Ld. Raym. 65; S. C. 1 Salk. 347; S. C. 12 Mod. 82. *S. P. REX V. FELL.* H. T. 1698. K. B. 1 Salk. 272; S. C. 1 Ld. Raym. 424; S. C. Holt, 279.

But a commitment for rescuing a traitor ought to specify the treason for which the traitor was committed.

On a motion to discharge the defendants, who were committed by the secretary of state, being charged with high treason, in being privy to, and assisting in the escape of Sir J. M. out of the custody of one of the king's messengers. It was objected that the warrant did not show for what treason Sir J. M. had been committed. *Per Cur.* The species of Sir J. M.'s treason ought to be expressed; and for want of that, they were bailed accordingly.

3d. *For being a rogue and vagabond.*

1. *REX V. SYMONDS.* M. T. 1701 K. B. 1 Ld. Raym. 699; S. C. Holt, 406; S. C. 12 Mod. 566.

[570]
A commitment stating the offender to be a lewd and disorderly person is good;

The defendant was brought into this court on an *habeas corpus* directed to the House of Lords for a contempt against the house, is good, although it does not express the nature of the contempt, nor the place where it was committed, nor whether it was on a conviction or accusation only; the Earl of Shaftsbury's case, 1 Mod. 144. abridged *ante*, vol. 3. p. 324.

the keeper of New Prison; and at the return thereof it appeared, that she was committed by Mr. P. a justice of peace, to New Prison, because she was a lewd, idle, and disorderly person; for that she was found in a reputed bawdy house: and it was moved that she might be discharged, because the commitment was illegal: because the barely being found in a bawdy house was no cause of commitment. Per Holt, C. J. The barely being in a suspected house at a time not unseasonable, shall never be a cause of commitment; but the justices may commit a lewd, idle, and disorderly person; therefore, a general commitment, that she was an idle and disorderly person, would have been good. But here the justice of peace assigns that for cause of idleness and disorderliness, which is no cause, viz. the being found in a house of ill repute; and therefore this commitment seems ill.

2. REX v. HALL. H. T. 1693. K. B. 3 Burr. 1636.

But a commitment for being a rogue and vagabond, by leaving his wife and children to be maintained by his parish, must allege that his wife and children were chargeable to the parish.

The defendant was committed by two justices, on being convicted under stat. 17 Geo. 2. c. 5. of being a rogue and a vagabond, and running away from his wife and family, whereby they became a burthen to the parish, on which he brought his *habeas corpus*; and when brought up it was objected, that it was not alleged that his wife and children were chargeable to the parish. Per Cur. The objection is sufficient to invalidate the commitment. The defendant must be discharged.

4th. For Treason.

1. REX v. WYNDHAM. T. T. 1717. K. B. 1 Stra. 3. S. P. COMB'S CASE. T. T. 1717. 10. Mod. 334. *Semble contra*, RUDYAD'S CASE. T. T. 1670. C. P. 2 Vent. 22.

A commitment for high treason generally, [571]

On a *habeas corpus* to discharge the defendant, because the commitment is generally for high treason; it was urged, that some particular species of treason must be expressed, and that it must have so much certainty as to appear to be high treason to the Court; 2 Inst. 52. 591. The Court said: we think this opinion is not to be maintained. We presume a magistrate does right till the contrary appears; and it has never been held necessary to express the overt in the commitment. Lord Coke puts the case of treason against the kings person, and admits that to be sufficient.

2. REX v. DESPARD. T. T. 1798. K. B. 3 Smith's Rep. 369.

Or for treasonable practices is good,*

On motion to discharge the defendant, committed for *treasonable practices* on the ground that the commitment was too general, the Court overruled the Court overruled the objection

(C MODE OF TRYING ITS TENABILITY.)

- REX v. FENWICK. E. T. 1806 K. B. 3 Smith's Rep. 269.

Upon a *habeas corpus*, on which the gaoler returns a commitment, the Court will only try the validity of the commitment from what appears upon the face of it,

It appeared from a return made to a *habeas corpus* that an apprentice had been committed for absenting himself from his masters's service, under the 20 Geo. 2. c. 19. s. 4. but the proceedings were all correct upon the face of them. Upon which the Court remanded the apprentice, although it was sworn that he was bound when a minor, and that when of full age he avoided his indentures. See 5 T. R. 715.

VII. RELATIVE TO THE OFFICER'S DUTY ON A COMMITMENT.

- REX. v. JOHNSON. T. T. 1705. K. B. 11 Mod. Rep. 62; S. C. Frem. 119.

On a motion to quash an indictment, which set forth, that a justice had committed a woman to prison, there to remain till further examination; and that because the officer did not carry her to prison, but kept her in his own house (though he brought her forth on demand, he was indicted, as disobeying the justices order, and behaving himself negligently, &c.

Per Cur. He ought to have carried her to prison forthwith; whereon the Court refused to quash it.

It is the officer's duty on a commitment to carry the offender to prison.

* Without stating the specific accusation; see 2 Hawk. P. C. c. 16. And in the case of Wilks a commitment for publishing "a most infamous and seditious libel, entitled, The North Briton, No XLV., tending to inflame the minds and alienate the affections of the people from his majesty, and to excite them to traitorous insurrections against the government," was holden good, 2 Wils. 158. See Butt v. Conant, Gow. N. P. C. 84; S. C. 1 B. & B. 348; S. C. 4 Moore, 195.

VIII. RELATIVE TO THE EXPENCES OF COMMITMENT.

The charges of a commitment are to be paid by the offender if able; 3. Jac. c. 10. If not able, to be defrayed out of the county rate, except in Middlesex, where the same shall be paid by the overseers of the parish where the person was apprehended; see 27 Geo. 2. c. 3.

IX. RELATIVE TO THE GAO'ER'S RECEIVING PRISONERS.

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If a man be committed for felony, and the gaoler refuse to receive him, the constable has no alternative but to bring him back to the committing magistrate; but would the person who arrested him be justified in detaining him in his own house; Dalt. 170; and the gaoler be punished for such refusal by the justices of gaol delivery? 4 Ed. 3. c. 10., and 55 G. 3. c. 50. And if the gaoler have occasion to be absent from his prison, it is his duty to have some person in his place, on whom notices may be served for delivery of copies of commitments, &c.; 1. Chit. C. L. 118.

X. RELATIVE TO A COPY OF THE COMMITMENT.

1. By 31 Car. 2. a gaoler refusing copy of commitment within six hours after demand of prisoner, shall, for first offence, forfeit 100*l.* and for a second offence 200*l.* and be deprived of his office, and the prisoner suing shall be entitled to the costs of action. See 1 H. Bl. 10.

2. *SEDLEY v. ARDEN* E. T. 1800. C. P. 3 Esp. 174.

This was an action on the 31 Car. 2. for not furnishing the plaintiff with a copy of the commitment within six hours after demand. It appeared that the offender was a person sent over from Ireland, under a warrant from the secretary of state for Ireland, charged with having secreted property to a considerable amount. The warrant from the secretary of state for Ireland directed one A. B. to carry the prisoner to London, and upon his arrival there to take him before the chief justice of the K. B. in order to try, &c. On his arrival here, A. B. applied to the gaoler of the Poultry Compter to receive him, which he refused, without other authority. A city constable was called in, when the gaoler received him, in pursuance of the warrant from the Secretary of Ireland, which was left with him; when he demanded a copy of the commitment, which the gaoler refused to furnish; and for the penalties thus incurred, this action was brought. For the defendant it was contended that this was not such a committal as required a copy of the warrant, the party being merely under the gaoler's care for a safe custody until the plaintiff could be brought before the judge; and, further, that the secretary of Ireland could have no power to commit to an English gaol. But *Lord Eldon, C. J.* said: the question is, was the plaintiff in custody under a warrant of detainer or not? If he were not, false imprisonment lies against the gaoler; if he were in custody under a commitment of detainer, this action is maintainable. Now I am clearly of opinion, that it was a warrant of commitment and detainer, and that the prisoner was entitled to a copy of it, and that therefore the offence has been committed. It has, however, been said, that this was not a warrant of commitment and detainer; how can that proposition be supported? The gaoler, after receiving it as such, cannot question its legality.

3. *HUDSON v. ASH* E. T. 1718. K. B. 1 Stra. 167.

The plaintiff's wife was taken up by a warrant of a justice of peace, for assaulting the overseer of a parish, and assisting the escape of a woman delivered of a bastard child. When she came before the justice, she could not find bail but at her request he gave leave for her to lie that night at the constable's house, in order to get bail the next morning. Then a person on her behalf demanded a copy of the commitment, which not being delivered, an action was brought on the *habeas corpus* act. *Pratt, C. J.* The questions are two; whether the defendant is an officer, and whether the plaintiff's wife was detained by virtue of any warrant within the meaning of the statute. As to the defendant, there is no doubt but a constable is within the statute, but I do not think this

The prisoner is entitled to a copy of the commitment within 6 hours after demand;

And the statute applies to a person sent over from Ireland under a warrant from the secretary of state there, in pursuance of such warrant, in the Poultry Compter for safe custody.

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But it does not apply to a case where a person after appearing before a justice, being unable to find bail, is at his own

request per action well brought; for the woman was not in his custody by virtue of any warrant; what warrant there was, was only to bring her before the justice, and continue in that was fully executed by so doing; and the time she staid at the constable's in the custody of the officer after that, was not by any warrant or commitment, but at her own consent and desire, to remain under a voluntary custody; neither is this case within the mischief of the statute, which was indefinite commitments.

4 HUNTLEY v. LUSCOMBE. M. T. 1801. C. P. 2 B. & P. 530.

Case against a gaoler for not delivering to the plaintiff within due time, a copy of the warrant by virtue of which he had been committed to the gaol at which the defendant acted as keeper. It was proved that a notice, directed to the defendant, and containing a demand of a copy of the commitment, was

And, in or der to sup port an ac tion against a gaoler for not deliver ing to a pri soner a co py of his com mit ment, proof of a deliv ery of a de mand to a turnkey is insufficient, if the gaoler was in the prison at the time of such deliv ery, or the prisoner has not used due means for bringing the circum stance with in the gaol er's know ledge. [574] served on the turnkey on the 25th November, and such a copy was thereon delivered to the plaintiff on the 27th, though the statute 31 Car. 2. c. 2. s. 3. imposed on the gaoler a necessity of delivering such a notice within six hours after demand. An objection was taken, on the defendant's behalf, that the service of the notice was insufficient, it being in evidence that the defendant resided in a house adjoining the prison, with which there was communication by a door. The plaintiff was nonsuited, and a rule nisi for a new trial was obtained; when, *per Cur.* It has been argued that the statute, for non-compliance with which a claim to redress is asserted in this case, is of a remedial nature, and therefore to be constructed as favourably as possible for the relief of prisoners; but the act also assumes a penal character, as against gaolers under peculiar circumstances; with reference to which it must therefore be construed strictly. Premising this, it is the duty of a judge to consider the object of a plaintiff in commencing an action like the present; and if he appears to have been actuated by vexatious intentions, to require that he should show that he has preserved such exactitude of conduct, that the offending party has not been allowed to effect the wrong inducing the penalty, when timely precaution would have deterred its commission. The statute directs that the demand shall be made to the gaoler, or his deputy; or whatever officers may be acting in subordination to him; and the inference that arises naturally on the words of the act is, that the gaoler is the person of primary consideration, to whom the requisition should be made, if possible, the inferior officers serving as a resort in his absence. Now it is in evidence that the defendant's residence adjoined the prison, and communicated with it by a door, thereby affording a ready access to him, if required by any person within the walls; and it is further shown, that the notice in question was served on a turnkey; but not a tittle of evidence has been adduced to show that the plaintiff had taken precautions necessary to convey it to the hands of the principal, not even that he had instituted the least inquiry whether the fact had ever reached his knowledge; he has even failed to examine the turnkey on whom it was served, and so left it dubitable whether the person so served was conscious of the purport of the document. On the whole, we think that the plaintiff has acted with so little caution, that he cannot ask favour from the Court.

XI. RELATIVE TO CERTIFYING THE COMMITMENT.

By the 3 H. 7. c. 3. the sheriff or gaoler shall certify the name of every prisoner in his custody to the next general gaol delivery, on pain of forfeiting 100*l.* to the king for every default.

XII. RELATIVE TO DISCHARGING THE PARTY COMMITTED

A party wrongfully committed may be discharged by *habeas corpus*.

1. If a person be committed to gaol by justices of the peace, no *certiorari* will lie to remove the order, the only remedy being by writ of *habeas corpus*—see 1 Dick. J. 468.

* It seems that a person legally committed for a crime, which appears really to have been committed by some one or other, cannot be lawfully discharged by any one but by the king, till he be acquitted on his trial, or have an *ignoramus* found by the grand jury, or is discharged by proclamation for want of prosecutors. But if a person be committed on a bare suspicion, without any appeal or indictment, for a supposed crime, where after-

2. ANON. H. T. 1696. K. B. 1 Salk. 349.

Per Holt, C. J. If the chief justice of the King's Bench commit any person to the marshal by his warrant, he ought not to be brought before Court by rule, but by *habeas corpus*.

And there fore a party committed by the C. J. ought to be brought before the Court by *habeas corpus*, and not by rule; [575] But a *habeas corpus* does not lie to discharge a party committed in execution by a court of oyer and terminer, on an informal commitment.

3. BETHEL'S CASE. T. T. 1695. K. B. 1 Salk. 353; S. C. 1 Ld. Raym. 47.
The defendant, being indicted for buying and selling old money, was convicted at the Old Bailey, and fined 100*l.* And now, on a *habeas corpus*, directed to the keeper of Newgate, that he was committed by order of the Court of Sessions to the Old Bailey to his custody "tenor caju ordinis sequitur in hæc verba, viz. Willielmus Bethel convictus, &c. ideo consideratum est," that he be fined 100*l.* "et quod ibidem, viz. in custodia quousque finem persolvat." It was held *per Cur.* that this commitment was naught; 1st. Because it was not to the sheriff, who is the legal and immediate officer to every court of oyer and terminer; 2d, Because the word *committitur* is necessary to the form of a legal commitment. Then the question was, whether he could be discharged? *Et per Cur.* Before Bushel's case no man was ever, by *habeas corpus*, without writ of error, delivered from a commitment of a court of oyer and terminer; but this commitment was not causeless. Where a commitment is without cause, a prisoner may be delivered by *habeas corpus*: but where there appears to be good cause, and a defect only in the form of commitment, as in this case, he ought not to be discharged.

Committee.—See tit. *Attorney; Joint Stock Companies.*

Committee of Lunatic. See tit. *Lunatic.*

Committitur.*

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- IV. RELATIVE TO A SECOND COMMITTITUR, p. 577.
- V. EVIDENCE OF COMMITTITUR, p. 578.
- VI. AMENDMENT OF COMMITTITUR, p. 578.

Where the defendant is removed by *habeas corpus* from the Fleet prison to the K. B. no *committitur* is entered.†. [576] On render in discharge of bail, the *committitur* is made out by the judge, and sent with the defendant to the K. B. prison.

* I. IN WHAT CASES A COMMITTITUR IS NECESSARY.

REX V. THE SHERIFF OF MIDDLESEX. E. T. 1819. K. B. 1 Chit. Rep. 365.

Per Cur. Where the party is not in the custody of the marshal, but is in the custody of the warden of the Fleet, and is brought up by *habeas corpus*, for the purpose of being removed from the Fleet, in order to be charged in execution in the K. B. the course of proceeding is, for the party to be brought to the judge's chambers, and the judge makes out the *committitur* by *habeas corpus*; he is then carried with the *habeas corpus* to the K. B. prison, and then it is not necessary to make entry of the *committitur*.

II. BY WHOM COMMITTITUR IS TO BE MADE OUT.

REX V. THE SHERIFF OF MIDDLESEX. E. T. 1819. K. B. 1 Chit. Rep. 364.

Bailey, J. in delivering his judgment in this case, said: when the bail bring the defendant to the judge's chambers to be rendered, the judge makes out a *committitur*, and that *committitur* to the marshal or his officer. It is the duty of the clerk of the papers then to make an entry in the marshal's book.

III. RELATIVE TO THE ENTRY OF COMMITTITUR.

1. REX V. THE SHERIFF OF MIDDLESEX. E. T. 1819. K. B. 1 Chit Rep. 364.

Per Cur. Where a man is previously in the custody of the marshal, and wards it appears that there was none, as for the murder of a person thought to be dead, who afterwards is found to be alive, it hath been holden that he may be safely dismissed without any further proceeding; see 1 Hale, P. C. 583; 3 Inst. 209; Keilwood, 34.
A *committitur* is drawn up on unstamped parchment, and filed in general with the clerk of the judgments, in order that he may enter the *committitur* on record; see 1 Tidd, 368. 8th ed.

† But where defendant is in custody of the marshal, and sought to be charged in a new action, a *committitur* must be entered; Rex v. Sheriff of Middlesex, 1 Chit. Rep. 364. abridged post, 576.

Where defendant is in custody of marshal, but sought to be charged in a new action, a *committitur* should

be entered with clerk of the judgments;^{*} it is wished to change the character of his commitment, he being previously in execution, then it is necessary to enter the *committitur*; but the *committitur* is not entered with the clerk of the marshal, but entered with the clerk of the judgments, for the purpose of being referred to when the custody is changed.

And formerly it must have been actually entered on record before the end of the second term; In that case the *committitur* is given in charge to the marshal, because there is no document left with the marshal unconnected with the entry in his book.

2. UNWIN A. KIRCHOPPE. M. T. 1744. K. B. 2 Stra. 1215. S. P. FOTTER L. v. PHILBY. H. T. 1766. K. B. 3 Burr. 1841.

On motion to supersede the defendant, as not being charged in execution within two terms, the Court held, that the *committitur* must be actually entered on record before the end of the second term. And that there is no extension of the time to the continuance-day after term, nor was it sufficient that there was an entry in the marshal's book in time.

3. REG. GEN. E. T. 1801. K. B. 1 East, 410. See DUCHESS OF MARLBOROUGH v. WIGMORE. H. T. 1735. K. B. Ca. Temp. Hard. 208. *Contra*.

[577] It is ordered, that every commitment, on every judgment obtained in this court against any prisoner or prisoners, shall be filed with the clerk of the dockets on or before the last day of the term in which such prisoner or prisoners is or are to be charged in execution. And the said clerk of the dockets shall enter such *committitur* on the judgment-roll within four days next after the end of such term, exclusive of the last day of the term, unless the last of such four days be Sunday, and in that case within five days next after the end of such term; and, in default thereof, such prisoner or prisoners shall be entitled to be discharged.

And must be filed the same term as the marshal's acknowledgment. execution, and ought to be entered on the judgment roll within four days after the end of such term,

4. CUNNINGHAM v. COGAN. T. T. 1808. K. B. 10 East, 46. S. P. FISHER v. STANHOPE. M. T. 1786. K. B. 1 T. R. 464,

On a motion that the *committitur* might be taken off the file, the objection was, that the marshal's acknowledgment of the defendant's being in custody had not been filed in the same term as the judgment was obtained. The Court said, that the acknowledgment ought to be of the same term in which the defendant is charged in execution.

5. PURDOM v. BROCKBRIDGE. M. T. 1823. K. B. 2 B. & C. 342; S. C. 3 D. & R. 597.

A defendant having been charged in execution upon a judgment, the plaintiff's attorney filed the *committitur* piece with the clerk of the dockets, pursuant to the rule, Easter, 41 Geo. 3; but the latter having neglected to enter it on the judgment roll within the time prescribed by the rule, the Court ordered the prisoner to be discharged, though there was no default in the plaintiffs' attorney, observing: the rule of court upon which this motion was obtained is express and unequivocal in its provisions; and we have no discretion in applying it to the present case. See 1 D. & R. 472; 3 Burr. 1841; 1 East, 405, 410.

IV. RELATIVE TO A SECOND COMMITTITUR.

TOLPING v. RYAN. E. T. 1786. K. B. 1 T. R. 227.

The defendant having been taken in execution on a judgment, was discharged out of custody on account of an irregularity in the execution, it having issued for too much; being again charged in execution for the exact amount a rule was obtained to show cause why the second commitment should not be set aside. The Court said: the second commitment is informal, since there

* And it is usual, before that is done, to enter the *committitur* in the marshal's book, kept at the King's Bench office; see 2 Burr. 1049.

† Previous to this rule it was determined that if the plaintiff's attorney signed judgment and filed the *committitur* piece with the clerk of the judgments within the second term after verdict against prisoner, it was sufficient, though the final judgment and *committitur* were not entered of record till the continuance day after the second term, provided the entries were then complete; Pearson v. Rawlings, 1 East, 405, abridged post.

‡ But this rule does not apply to the case of a prisoner committed under a *habeas corpus*, in which no *committitur* piece was never necessary; see 1 Tidd. 368. 8th ed.

was no affidavit that the plaintiff had given notice that the first commitment was abandoned, pending the former rule: a second commitment for the same cause before the first was discharged, cannot be sustained. - Rule absolute.

V. EVIDENCE OF COMMITTITUR.

SALTE V. THOMAS. T. T. 1802. C. P. P. 3 B & P. 188.

In an action by the assignees of a bankrupt, the plaintiffs, in order to prove an act of bankruptcy by lying in prison for debt, produced certain books belonging to the King's Bench and Fleet prisons, containing entries of the dates and causes of commitment of all the prisoners, from which it appeared, that the bankrupt had been committed for debt to the Fleet prison, and had removed thence to the King's Bench prison, and had lain in prison in the whole for the space of two months. An objection was taken to the admissibility of these books in evidence of the cause of a commitment, but the plaintiffs had a verdict, with liberty for the defendant to move for a new trial. On a rule nisi for that purpose, *Lord Alvanley, C. J.* held, that as the *committitur* was open to resort for the cause of a person's commitment, and as the books produced, were kept not under legal constraint, but for the individual convenience of the gaoler, the *committitur* was a document of higher authority, and should, therefore, be produced. See *Leach, C. C.* 2d edit. 435.

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The cause of *committitur* is not proved by an entry in the books of the Fleet and King's Bench prisons.

VI. AMENDMENT OF COMMITTITUR.

LAROCHE V. WASSBROUGH. M. T. 1788. K. B. 2 T. R. 787. Abridged ante, vol. i. p. 594.

If a judgment against two be affirmed with costs on error brought by one alone, whereupon the other being a prisoner is charged in execution for the amount of the original judgment, and the costs in error (to which cost he is not liable,) the Court will allow the *committitur* to be amended, since there is something to amend by, namely, the original judgment.

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Commodatum. See tit. *Bailment*.

Common. See tits. *Copyhold; Descent; Dower; Inclosure; Joint Tenants; Poor Rates; Settlements; Taxes; Tenants in Common; Tithe.*

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I. GENERAL DEFINITION OF THE TERM.

Common, or right of common, appears, from its very definition, to be an incorporeal hereditament, being a profit which a man hath in the land of another as to feed his beasts, to catch fish, to dig turf, or the like; Finch, law, 157; 1

Inst. 122. a; 2 Bl. Com. 32; and Petersdorff's Supplement to the 3d vol. of Blackstone, p. 82. 2d edit.*

II. RELATIVE TO THE ORIGIN OF RIGHTS OF COMMON.

The privilege which is in this place the subject of investigation is derived from so clear and evident a source, that in the present inquiry, the only matter of surprise will be found to consist in the fact, that as regards particular eras of history, no traces or vestiges can be pointed out of its existence. But even the blank that is left in some of our early writers, may be supposed, without any extraordinary tax upon our reason, to have been caused by the immunity being on the one hand of such ancient origin, as not to require individual notice; and, on the other, not only consistent with the customs and manners of the period in which they lived, and which, in their productions they depicted; but highly essential and important, whether, even in those times, viewed as a personal advantage, or a public good. In tracing, however, this right from its first creation, in examining the cause of its being given effect to, and in deducing the various changes it has at different times undergone, from the alterations consequent upon all vicissitudes attendant on the different forms of government, and the peculiar exigencies of society, it will be invariably found to have been countenanced and encouraged in accordance with the strictest principles of political economy, and to have been productive of material benefit to England; as it, in the first place, led to the encouragement of agriculture and husbandry, by affording a greater facility to the tenantry to cultivate the soil of which they were the possessors; and has been ultimately itself prevented, from operating as an evil, by the power vested by the common law in the lord of approving, and by the interference of the legislature, in passing inclosure acts. The prevalent opinion that the right of common has had its origin in the remotest periods of antiquity is sufficiently confirmed by the sacred writings, although left unmentioned by the Greek writers, and not expressly recognized till the declining years of the Roman Republic. In Britain, they sprang from the king's grant to certain parties, who rendered him some service as a recompence; and from the creation of numerous subinfeudations, to which various services, were likewise incident: which property was parcelled out by these great feudatories to their followers, who thus became their tenants, reserving portions of land for their own demesnes; and, as what was distributed could not be serviceable to the tenants during the period their corn was growing, this privilege of pasturing their cattle on the lord's ground or waste was permitted. Hence common of pasture appendant was allowed, that the tenant might, during those periods, maintain his cattle for tilling his soil. With the same object, common of estovers were gradually introduced for the purpose of building houses, and repairing fences and inclosures; common of turbary for the purpose of fuel; and common of piscary for the support of the tenant's family. Other species of common have at times been tolerated as convenience or custom required. Nevertheless the advantages to be derived from a continuance of the system have been questioned by various writers; and although it is a practice which has been so long adhered to, it cannot escape observation, that it may be surmised whether the increase of population does not require a more definite and improveable allocation of the soil; especially as the modern and more judicious system of feeding cattle from the produce of cultivated and tilled land also points out the necessity of alternating the crops, and the consequent utility of an individual and specific appropriation of common land. It has, indeed, been said, that the expence of bringing into culture new soils of inferior quality to meet the wants of our increasing numbers, is so great, that such consideration is immaterial to an accurate conclusion on the subject, as the largest additional produce is obtained from soils already under tillage; and the grand means of increase consist in the application of additional

* In general, the ownership of the soil thus appropriated is in the lord of the manor wherein it is situate; but frequent instances are found of the joint and several property in a field residing in individuals, who use it for their mutual benefit.

labour. These considerations are, however, in a great degree speculative and theoretical; and although practical reasons may be adduced, both in favour and against a prolongation of right of commons, it must always remain a question, whether the advantages with which it is attended, or the evils with which it is fraught, preponderate; whilst at the same time no doubt can be entertained that their original introduction was consistent with sound sense and prudent policy. See Lowe on the Present State of England; Smith's Wealth of Nations; Dawson on the Causes of the Poverty of Nations; and the last Supplement to the Encyclopædia Britannica.

III. RELATIVE TO THE DIFFERENT CLASSES OF RIGHTS OF COMMON.

(A) COMMON OF PASTURE.*

1st. As to common of pasture appendant.†

1. Of its nature in general.

[584]
Common of
pasture ap-
pendant is
a right in-
separately an-
nexed to the
possession of
ancient arable
land, to feed
the beasts that
plough and
manure such
land and are
levant and
couchant thereon;

For altho' it
might formerly
be claimed as
appendant to
a cottage yet
that was on the
ground that a
cottage was
generally sup-
posed to have
four acres of
land belong-
ing to it;§

[585]
And the Courts
will always in-
tend in fa-
vor of such
right of com-
mon in respect
of which the
immemorial
enjoyment of

1. Common appendant is a right annexed to the possession of land, by which the owner thereof is entitled to feed his beasts on the wastes of the manor; the origin of which is thus described by Lord Coke: "When a lord of a manor wherein was great waste grounds, did enfeof others of some parcels of arable land, the feoffees, *ad manu tenendum servitium socae*, should have common in the said wastes of the lord; for two causes; first, as incident to the feoffment; for the feoffee could not plough and manure his ground without beasts, and they could not be sustained without pasture; and by consequence the tenant should have common in the wastes of the lord for his beasts, which do plough and manure his tenancy, as appendant to his tenancy; and this was the beginning of common appendant. The second reason was for the maintenance and advancement of agriculture and tillage, which was much favoured in law;" see 2 Inst. 85; 4 Rep. 37. a; and see Petersdorff's Supplement the 3d vol. of Bl. Com. p. 82. 2d edit.

2. GUNSTON v. SELBY. H. T. 1703. K. B. 2 Lord Raym. 1015; S. C. Salk. 169; S. C. 6 Mod. 114; S. C. Holt, 174.

In replevin, the defendant justified the taking *damage feasant* in his freehold. The plaintiff in bar said, he was seized of a cottage, and prescribed for common in the defendant's lands for all his cattle, *levant and couchant*, as appendant to his cottage. The defendant demurred; but the Court held the prescription good; for they said that a cottage contains a cartilage, and that they would suppose a cottage to have at least a court-yard to it; and further, that according to 31 Eliz. a cottage must have at least four acres of land appended to it. See Vaugh. 253; 2 Brownl. 101; Co. Litt. 56; 2 Inst. 736.

POTTER v. NORTH. 1 Saund. 350; S. C. 1 Lev. 268; S. C. 2 Keb. 517.
HOCLEY v. LAMB. 1 Lord Raym. 716. S. P. NORTH v. COX. 1 Lev. 253.

* Common of pasture is where one has, in common with other persons, the right of taking by the mouths of his cattle the herbage growing on land of which some other person is the owner. See Petersdorff's Supplement to the 3d vol. of Blackstone's Commentaries, p. 82. 2d, edit.

† Commons appendant exist only by prescription; 17 Ass. Pl. 7; 26 H. 8. c. 4; Bro. Com. Pl. 1. Co. Litt. 121. b; which presupposes a grant; and of consequence must have existed beyond time of memory; 5 Ass. Pl. 2. 22 Ass. Pl. 63; 26 H. 8. c. 4; Bro. Com. Pl. 1; 1 Balst. 18; 1 Rol. Abr. 396; so that it cannot be pleaded by way of custom; 6 Rep. 59; and yet it is not necessary to prescribe for common appendant; 4 H. 6. Pl. 10; 22 H. 6. c. 10; Co. Litt. 122. a; because it is of common right, and appendancy implies a prescription; Co. Litt. 122. a. It follows, that such a right cannot be created at this day; in conformity with which practice, where the lord approves part of his waste, he is not entitled to common in respect of his land so approved; 5 Ass. Pl. 2; 26 H. 8. c. 4; and see Woolrych on Rights of Common, p. 82. 2d ed.

‡ A prescription to have common appendant to a house, meadow, or pasture, is void; 4 Rep. 37. a.

§ And for the same reason it may be considered as appendant to a manor form or carve of land, though it contain pasture, meadow, or wood, for it will be presumed to have been originally arable; 4 Rep. 37. a, 3 Cru. Dig. 76; 5 T. R. 49; 1 Lev. 253.

|| This idea has been, however, put an end to by the 15 Geo. 3. c. 32., and therefore i

It appeared that the plaintiff had brought an action of trespass against the defendant, who pleaded that the *locus in quo* was part of a manor whereof the plaintiff was then seized, and that he, the defendant, was seized of an ancient messuage, being one of the free tenements of the said manor; and that all the tenants of those free tenements had time out of mind been used to have common of pasture for all their cattle, hogs, goats, &c., excepted, *levant et couchant*, upon the respective tenements, to which plea there was a demurrer, and the Court was divided, (but as it seems from the report in *Lev.* on another point.)

4. SCAMBLER V. JOHNSON. Sir T. Jones, 227; S. C. 2 Show. 248.

The defendant pleaded on an action of trespass, that he was seized of an ancient messuage, with the appurtenances; and the Court held this prescription good, saying, that it was not a common appendant, but apurtenant.

5. HOLLINGSHEAD V. WALTON. T. T. 1806. K. B. 7 East, 485.

Per Cur. There can be no doubt that a man may have two distinct substantial grants of right of common over different wastes, in different manors, from different lords, in respect of the same tenement. It may be advantageous to him to change his pasture from time to time for his cattle, *levant et couchant*, upon his tenement; and immemorial usage is evidence of such distinct grants. If indeed it had been shown, that the right over both commons had been originally granted by the same lord, that might have been a reason for a different construction.

2. Of the variations to which this right is subject.

1. MUSGRAVE V. CAVE. H. T. 1741. S. P. Willes Rep. 322.

In deciding whether a right of common, which came before the Court in this case, was common appendant, appurtenant or in gross, the following observations were made by one of the judges: "it cannot be common appendant, because that can only belong to arable land; as is held in *Co. Lit.* 122. a. It is of common right, and must be claimed in the waste of the lord. It is not for a certain number of cattle, but only for such as are *levant* and *couchant* on the land; and therefore it cannot be severed, not even for a moment, nor turned into common in gross. And the foundation of this right is, that when a lord grants to his tenant arable land, he must have cattle to plough it, he must have cattle to manure it; and if he has only arable land, he must keep his cattle somewhere whilst the corn is growing, and therefore, of common right, if the lord hath any waste, he may put his cattle there. This, therefore, cannot be common appendant; 1st, because it is not claimed as incident to arable land, but to the manor of Wentworth; 2dly, because it is for a certain number of sheep, and not for such only as are *levant* and *couchant*." See 10 Ed. 4. 10. M. T.; 15 E. 4. 32; Bro. Com. Pl. 8; Noy's Rep. 145; Hard. 117; 3 Keb. 66; 1 Saund. 352; 8 T. R. 396; 1 B. & A. 711; 3 Com Dig. 84.

2. BAUNT V. REEVE. 174. C. P. Willes, 231.

The term *levancy* and *couchancy* is thus explained by *Willes, C. J.* when speaking with reference to the case on which he was delivering judgment: "the tenant can only have a right of common for such cattle as are *levant et couchant* on his estate; that is, for such and so many as he has occasion for to plough and manure his land in proportion to the quantity thereof." See 4 Vin. Abr. 584; 37 H. 6. 34; Bro. Com. pl. 13; 10 E. 4. 10 B.; Co. Litt. 122. a; 3 B. Com. 239.

3. LEACH V. WIDSLEY. H. T. 1768 K. B. 1 East 54. DEAN AND CHAPTER OF SALISBURY'S CASE. Sir W. Jones, 282. SAWYER'S CASE, *id.* 286. ROGERS V. BURSTEAD. Sel N. P. 413. 4th ed. SCHOLEY V. HARGREAVE. M. T. 1792. K. B. 5 T. R. 47. CREESEMAN V. HARDHAM. T. T. 1818. 1 B. & A. 711.

would not at present be correct to plead a right of common, as appendant to a cottage land; only.

† Unless by usage; thus on a question of apportionment, where it was held that the common in question being appendant, should be apportioned. the prescription was for three other beasts, three horses, and sixty sheep; 1 Brownl. 180; 17 E. 3. 20. s. 34; Rol. Abr. 397-8.

commonable right has been proved;

Unless pleaded so as to exclude the possibility of such an intend ment.

It was resolved by the Court of K. B. that the owner of a tenement may have two distinct rights of common for his cattle, upon different wastes in different manors, under several lords.

This right of common consists of several sorts. It cannot, however, in its strict nature be for a certain number of beasts; but for such only as are *levant et couchant*.

[586] The number of cattle which are allowed to be *levant* and *couchant*, shall be ascertained; by the number of cattle requisite to plough and manure the

Or which the land can maintain during the winter.*

[587]

In an action of trespass for chasing sheep, the defendant justified the supposed wrong for damage feasant. The plaintiff replied, a right of common; the defendant rejoined, that the place in which, &c. was a large waste, in which he had common appurtenant; that the lot inclosed the place in which, &c. and that the plaintiff had sufficient common for all his sheep *levant et couchant*, &c. The plaintiff demurred, and it was said the ground might have been understocked, consequently that the allegation should have been of common sufficient for the aforesaid tenement; but the rejoinder was holden good, the Court saying, that by the words *levant et couchant*, the plaintiffs intended as many cattle as the land would maintain, and the defendant could not be entitled to more. See Goulds. 117; Noy. Rep. 30; 1 Mod. 7; Saund. 343.

4. SMITH V. FEVERELL, H. T. 1673. C. P. 2 Mod. 7; S. C. 1 Freem. 190; S. C. 1 Danv. 810.

Particular circumstances may, however, controlsuch general rule.

In this case the defendant pleaded a licence from the lord of the soil, to put cattle into the waste, which was agreed to comprehend hogs as well as other cattle in the most geneal sense; the plaintiff demurred, and after judgment had been given for the plaintiff on another point. *North*, C. J. said, that the licence being general to put in beasts, it should be intended only of commonable cattle, and not of hogs, but it would be otherwise if the licence had been for a particular time. See 25 Ass. pl. 8; Bro. Com. pl. 13. and 14. 41; 1 Rol. Ab. 405; 9 H. 6. 36; 15 Ed. 4. 33; Co. Lit. 122. a; 4 Vin. Ab. 192.

5. MANNETON V. TREVILIAN. M. T. 1682. K. B. 2 Show. 328; S. C. Skin. 137.

It is not essentially necessary that the cattle should be the commoner's own absolute property, provided there be a special property in them.

Replevin for six cows. Avowry for damage feasant. Replication, stating seisin of certain lands, and a right to common of pastures for beasts *levant et couchant* on those lands, and that those six cows being his cattle, and *levant et couchant*, he put them in, &c. Rejoinder with an *absque hoc*, that those were the proper cattle of the plaintiff *levant et couchant* on those his lands. Demurrer thereto. It was argued that the property thereto was not traversable: that it might be pleaded; that it could not be traversed, because it was admitted by the avowry; and that, besides, the *levancy* was ill traversed. It was, on the other side, urged, that the *levancy* was not the sole measure of the common, but that there must be a property also, so that the right could not be tried without the traverse, and that a man could not have common for beasts, in which he had not a general or a special property. And the Court held the traverse good, and gave judgment for the avowant.

6. RUMSEY V. RAWSON. E. T. 1668. K. B. 7 Vent. 18. 26; S. C. 2 Keb. 410. 493; S. C. Sir Tho. Rd. 171.

And they be employed to the advantage of his own soil,†

In replevin, the defendant avowed the taking damage feasant; the plaintiff The place for feeding may also be limited; for one may have a right of pasture for thirty beasts in this place, and a similar right for ten out of the same number in that, both places being in the same waste; 17 E. 4. 34; 1 Rol. Abr. 397.

* In Brownlow, the measure is stated to be as many as, being nourished and fed on the land, may there lie summer and winter. (2 Brownl. 101.) There is not often, however, any substantial disagreement between these two methods of regulation; since it usually happens, that the average produce of a farm will afford a sufficient maintenance during the winter, for the cattle which have been serviceable in tilling the land; see Woolrych on Rights of Common, p. 22. "But the question is not yet so clearly settled, that if a case should happen in which these measures must necessarily be divided, there would not be a new decision. Suppose, for example, that on dry and hungry grounds a man is compelled to employ more beasts than he may maintain on his land during the winter; is he not to recur to the former admeasurement, which allows all cattle necessary to tillages a right of this nature. With reference to common appendant, it would seem to be a matter of common right; and touching common appurtenant, as we find that beasts may be borrowed to plough, and compost soil having these rights generally attached to it, it follows, that the privilege should be extended for such purposes to commoners of the latter description. The true meaning of the phrase seems to be, that a man shall not surcharge the waste by feeding a number of cattle, which are neither necessary to cultivate his farm, nor can be maintained on its produce; but that he should, at all events, be allowed pasture for the animals which assist in rearing his profits, whether he can fodder them in winter or not: which, however, is seldom, if ever, the case;" see Woolrych on Right of Common, p. 27.

† The question of whether the property of the cattle depasturing a common appendant must not invariably reside in the party who enjoys the right, has, however, in very early

prescribed for common as belonging to the glebe of the parson of such a parish; he then said, that his beasts were *levant et couchant* upon the glebe, and that he put them into the common by the license of the parson. After a verdict for the plaintiff, it was moved in arrest of judgment, that license cannot be given by a commoner to put the cattle of a stranger on his common. And the Court were of opinion, that if the objection had been taken on demurrer, it would have been fatal; but that they would intend, after verdict, that the cattle were procured by the parson to compestre his land; and they gave judgment for the plaintiff.

7. *WALTER V. CHAUNCEY*. E. T. 1668. K. B. 1 Vent. 41; S. C. 2 Keb. 676. The right may be as limited as to time; In trespass the defendant justified for damage feasant. Plaintiff, in his replication, prescribed for common *in locus en quo*, until it was sown again: to which the defendant demurred, on the ground that it was unreasonable to have common in lands sown. But the Court held, that as the prescription was laid, the common was not claimed until after the corn was reaped. See 1 *Roll. Abr.* 364.

8. *MILL V. WARD*. T. T. 669. K. B. 1 Vent. 92. *CHANDLER V. MELLAND*. 2 Keb. 491.

Trespass for breaking down, &c., and putting in defendant's cattle. The defendant justified for common, which he prescribed for in this manner; namely, that for two years together he used to have common there, after the corn reaped and carried away, until it was sown again: and the third year to have common for the whole year; and that the year the plaintiff declared for the trespass was one of the years the field was sown; and that, after the corn was reaped and carried away, he put in his cattle; *absque hoc*, that he put them in *aliter vel alio modo*. The plaintiff demurred, which it was ruled he might; for the defendant did not answer to the time, wherein the trespass was alleged, and the answer will not help it, for that *aliter vel alio modo* did not refer to the time. See 17 *Ass. Pl.* 7; 17 *Ed. 3.* 36. 34; *F. N. B.* 180. E; *Yelv.* 185; 1 *Brownl.* 189.

cases, given rise to considerable litigation; but the conclusion to be drawn from them seems to be consonant with the doctrine laid down in the cases abridged in the text. A man brought an assize of common against the lord of the vill. for seizing cattle the property of the plaintiff's tenants, which were fed upon the waste under the sanction of his name and authority; and the Court were decidedly against him, saying, that if he had common he ought to have used it with his own proper cattle; and that such a vicarious licence was tortious, and could not be suffered in law; 45 *E. 3.* 35; *Bro. Com. pl.* 5; 22 *Ass. pl.* 84; *Bro. Com. pl.* 40; 11 *H. 6.* 22. b; 14 *H. 6.* 6. b; 15 *E. 4.* 32. b; and see 4 *H. 4.* 4. b; 11 *H. 6.* 6; 6 *H. 7.* 14. b. Neither can a commoner, in general, agist the beasts of a stranger; 22 *Ass. pl.* 84; 11 *H. 6.* 22; *Bro. Com. pl.* 40. 47. But it was laid down in the above case, that if one had a grant of common for his own profit, in the presence and with the assent of the owner, a sufficient seisin was established for the purpose of maintaining an assize; 45 *E. 3.* 26; *Bro. Com. pl.* 5; see also 4 *Vin. Abr.* 585; *F. N. B.* 180. b; 22 *Ass. pl.* 84; 11 *H. 6.* 22.

* "A right to common appendant, it has also been said, may be upon condition that it shall cease if a man discontinue his residence on a certain messuage. At all events, the Court seemed to admit the point, although they gave no direct opinion; 37 *H. 6.* 84; 1 *Roll. Abr.* 397. d. In the same case it was said in argument, that this common might endure whilst a man should pay so much money; and that if he ceased to pay, the common should cease; 37 *H. 6.* 34. But as no authority is referred to in support of this latter position, and as it certainly does not accord with the nature of a common appendant, which is a right grafted on the occupation of certain lands, it may be inferred, that it relates only to common appurtenant, which is much confounded in the old books with the right of common appendant;" see *Woolrych on Rights of Common*, 30. 31.

† So a man may prescribe for common when the lord pastures it; 27 *E. 3.* 33. So to have common in a meadow after the hay is carried till Candlemas; 17 *E. 3.* 26. 34. So from the Feast of St. Augustin till All Saints; 17 *E. 3.* 26. 34. In a case where a man prescribed for common appendant, as follows, that whenever the land was sown by consent of the commoner, then he was to have no common till the corn was cut, and then to have common again till the land was sown by the like consent of the commoner, it was objected that this prescription was against common right; for it was to prevent a man from sowing his own land, without the leave of another. The whole Court held the prescription good for the owner of the land could not plough and sow it, when another had the benefit of the common; but in this case both parties had a benefit, for each of them had a qualified

[590]

Corporations are entitled to a right of common appendant.

3. Of the parties who may enjoy it.*

1. MELLOR v. WALKER. H. T. 1668. K. B. 2 Saund. 1.

Trespass. Plea of justification, because the *locus in quo* was a certain portion of land with the appurtenances in D., which said portion of land, &c. is, and at the same time was, &c. and also from the time whereof the memory of man is not to the contrary, was parcel of a certain common field called F. in D. aforesaid. The plea then alleged that D. was an ancient borough, and defendant a burgess of it, and that the burgesses of the said borough were immemorably a body corporate, by the name of bailiff's &c. until the 11th of July, 14 Car. 1. on which day they were incorporated by the name of the mayor and burgesses of the borough of D. The defendant then prescribed in the said corporation for themselves and every burgess to have common in L. for all their commonable cattle, *levant et couchant*, within the said borough, at certain particular times. The plea next averred, that the defendant put his cattle into the common, which was the same trespass as complained of, and traversed that defendant was guilty of such act at an improper period. Gen-

interest in the land; 1 Leon, 78. It is worthy of notice, that stints, both as to time and number, may exist together. As a general rule, however, most commons are stinted to certain times of the year, and the privilege is chiefly permitted at this day, from the middle of spring until the rise of autumn; probably because the pasture not being used during the winter becomes more plentiful, and the cattle are fed from another source during that season. The season for opening common fields has been in some instances pointed out by the legislature. By 13 Geo. 3. c. 81. s. 7. it is enacted, that three-fourths in number and value of the occupiers of open and common field lands, present at any meeting to be held in pursuance of 14 days' notice at least, to be given by one third of such occupiers, previous to the opening of such common field lands, may postpone the opening of such common field lands for such reasonable time as at such meeting shall be thought necessary by such majority as aforesaid; and settle and determine how long such common fields shall continue open, and limit and settle the number of cattle each occupier shall respectively turn on such common fields, in due proportion to the stint or established usage in the parish or place where such fields are. The 17th section applies generally to stinted commons of pasture; it declares, that whereas such commons, which are never enjoyed in severally, exist in many parts of the kingdom, and are shut up at certain times for the better growth of pasture, and opened on certain fixed days, from which, in particular circumstances and seasons, great inconveniences do and may arise, it shall and may be lawful for the major part in number and value of the owners and occupiers of such common pastures, present at a meeting, to be held after six days' notice at least given, by one-third of such occupiers, with the consent of the lord or lords, lady or ladies, of the manor, or his, her, or their steward or agents, to postpone the opening of such common pastures for a time not exceeding 21 days. The 18th section, after reciting that there are in many places common pastures, with stinted or limited rights of common therein, which are open the whole year, and that it would be attended with great advantages to the commoners to shut up and unstock the same at particular seasons, enacts, that two thirds in number and value of such commoners may, at a meeting to be holden after 14 days' notice, given by one-third, with the consent of the lord or lords, lady or ladies, of the manor or manors in which such commons are situated, his, her, or their steward or stewards, agent or agents, direct, order, and fix the time when such common pastures shall be broke or depastured, and when the same shall be shut up and unstocked; such orders to continue in force for one whole year, and no longer. By the 19th section it is provided, that a portion of such common pasture shall be separated, and set apart for the use of such commoners exclusively as shall not consent to such regulation, and the portion so set apart shall be adjudged by a majority of such commoners, not consenting, as an equivalent for their rights of common,

* "The lord may of course have it in his own tenancy, but such tenancy is intended generally of all waste lands in the manor where the lord claims an immediate ownership in the soil, as a matter of right. But there are other cases wherein the lords tenants are intended to be those who hold certain lands under him by deed or otherwise, and a custom that the lord should have common in the lands of such tenants has been holden bad, being contrary to the nature of a demise;" see Palm. 211; 2 Brownl. 298; and Woolrych on Rights of Common, n. 31. "So infant's executors, assignees, husbands in right of their wives, and other representative persons, may also have this right vested in them; and as an alien may take a lease, it will be allowed that he may enjoy a right of common, connected with the land he occupies under that lease;" see Vaugh. 190; and Woolrych on Rights of Common, 32. n.

† Whether lay or ecclesiastical, and in the latter case, whether sole or aggregate, as a dean and chapter (Sir W. Jones, 282. Atk. 189.): an abbot or parson (17 E. 3. c. 26; Godb. 4.)

eral demurrer and joinder on a point unconnected with the margin of this case, as here abridged. The court held the plea good in all respects, and gave judgment for defendant. See 2 Lev. 246.

2. FISHER V. WREN. M. T. 1688. K. B. 3 Mod. 250.

A prescription for a writ of common was in this case pleaded, that all the freeholders of a manor, together with copyholders, according to the custom of the said manor, have enjoyed a sole and separate pasturage in a certain ground, parcel of the manor. A motion was made in arrest of judgment; and *inter alia* it was objected, that the custom was not good, as pleaded, to exclude the lord, for it never could have a good commencement, because copyholders had common in the lord's soil only by permission to improve their estates, which common being shared by the lord and used by the tenant, becomes a custom: but no usage amongst the tenants, or permission of the lord, could wholly divest him of his soil, and vest an interest in them, who in the beginning were only his tenants at will. It was argued that the plea was good enough; but if not it was urged, on the grounds advanced by the opposite side, that it ought to have been demurred to. The case was afterwards adjourned.

3. CROWTHER V. OLDFIELD. H. T. 1705 K. B. 2 Lord Raym. 1225; S. C. Salk. 364; S. C. 6 Mod. 19; Holt, 146.

In this case it appeared, that a man stated himself to be seised as a customary tenant of a manor in fee simple, according to the custom of the manor of an estate which was parcel of a manor, and held by copy of the court rolls, in respect of which he had a right of common on a particular part of the manor. A verdict was found, establishing the truth of the facts stated, which it was now upon error attempted to reverse, on the ground that the estate was not represented to be held at the will of the lord. But the Court said: the fault in this declaration is helped by the verdict. It is fully enough expressed to show it to be a copyhold estate, though it be not so formally done. It is said to be parcel of the manor, and that by the custom of the manor, the plaintiff is entitled to a common, and all this is found by the verdict. It should have been said, indeed, that the tenements were held at the will of the lord, according to the custom of the manor, to have them appear fully to have been copyhold; but unless they were copyhold, it is impossible this finding could be true.

4. ORDEWAY V. ORNE. 1 Bulst. 183. S. P. TURNERY V. FISHER. 2 id. 87.

A prescription was pleaded that every householder, time out of mind, ought to have common in a certain vill. It was said by Williams, J. that this claim could not be allowed; if the prescription had been for common belonging to a house, it might have been good; but here was an uncertain measure of claimants, and the Court agreed with him in opinion. See 6 Rep. 59; 15 E. 4. 29; 15 E. 4. 32.

5. ENGLISH V. BRUNELL. E. T. 1765. 2 Wils. 258.

In replevin, the defendants A. and B. avowed, that A. was seised in fee, and in possession of a certain ancient messuage, and that A. and B. as owners and occupiers of their respective messuages, and all other occupiers of those messuages, had been immemorially accustomed to have common; and a verdict being found for such avowants, it was moved in arrest of judgment, that a temporary, and not a permanent interest was claimed, and, consequently, that the prescriptions could not be sustained; and the Court were of that opinion, and arrested the judgment.

4. Of the mode in which it is to be enjoyed.*

The different limitations that may be imposed on the exercise of the right now under consideration, have been already examined. It will only be necessary to state, that common appendant can only be used for such cattle as are

* By 32 Hen. 8. c. 15. s. 9. it is enacted, that no person shall put to pasture any horse, &c. infected with scab or mange, upon any waste grounds, &c. upon pain to forfeit to the lord for every such horse, &c. 10s. And by 38 Geo. 3. c. 65. there is a like provision to exclude sheep or lambs having the mange. The remaining sections of the act contain provisions as to marking sheep or lambs of three months old when turned on a common, and as to enforcing an adherence to such enactments. By the 13 Geo. 3. c. 8. s. 20, for the improvement of common pastures, and the better manuring and cultivation of arable lands in

So copyholders may claim the privilege; | 591 |

But they must assert their right by custom.

Inhabitants.

Or persons having a temporary interest, cannot be, however, allowed to prescribe.

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necessary for tillage, as horses and oxen to plough the land, and cows and sheep to manure it. 45 Ed. 3. 26; 14 H. 6. 6; 37 H. 6. 34; 1 ro. Com. pl. 13; Cro. Dig. 77; Co. Litt. 122. a; 4 Rep. 37; 2 Bl. Com. 32. The courts however, will intend, if possible, that the beasts put on are those that are commonable; as where there was a prescription for 20 great beasts, they were intended to be horses, oxen, kine, &c. 37 H. 6. 34; Bro. Com. pl. 13.

2d. As to common of pasture appurtenant.

1. Of its nature in general.

1. MOLLITON v. TREVILIAN. M. T. 1682. K. B. Skin. 137; S. C. 2 Show. 328.

Common appurtenant is a right which a man may acquire by grant or prescription.

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Replevin for 300 head of cattle. Justification for damage feasant. Repliation alleging a right of common. Rejoinder and justification; *absque hoc* that they were the cattle of the plaintiff *levant et couchant* upon, &c. To this traverse there was a demurrer, on the ground that the traverse was immaterial, as it ought to have been *absque hoc* that the cattle were *levant et couchant*, that being the measure of the common. In support of the traverse, it was, however, urged, that it comprehended the whole matter; and that it could not well be otherwise, for not only the levancy and couchancy is the measure of this common, but the property of the party likewise; for if they were *levant et couchant*, and yet were a stranger's cattle agisted into the land, or if they were the party's own cattle *levant et couchant*, upon some other land, and not upon the land in question; in either of these cases the right of common could not be claimed; for a man could not use his common with the cattle of a stranger, or with his own cattle *levant et couchant*, upon any other land than that to which he had common appurtenant. The Court coinciding with these arguments, gave judgment for defendant. See 15 E. 4. 33; Cro. Car. 482; F. N. B. 180. n; Co. Litt. 122. a.

2. COWLAM v. SLACK. H. T. 1812. K. B. 15 East. 108. S. P. PRETTY v. BUTLER. T. T. 1658. K. B. 2 Sid. 87.

And may be created at this day.*

This was a motion for a new trial; and the only question was, whether a nonsuit was maintainable, upon the ground that the evidence did not support the declaration. The plaintiff had alleged a disturbance of his right of common for all commonable cattle *levant et couchant*, on his land; and which right he claimed in all the counts of his declaration; but the last, as belonging and appertaining to the said closes of land: and in the last count, after stating that he was possessed of such closes, he alleged, "that by reason thereof, he was common fields, is enacted, that it shall and may be lawful to and for the major part of the number and value of the persons having right of common in such common pastures, at any meeting to be held in pursuance of notice in writing, under the hands of a major part of such owners and occupiers of such common pastures, or persons having right of common therein, to be affixed on the door of the parish church of the parish where such common pasture shall be, or of the nearest parish church where such lands shall lie, in an extra parochial place, 10 days at least previous to such meeting, and specifying the time and place, intent of such meeting, by writing under their hands, to alter and change the manner and custom of feeding and day pasturing, such common pastures, so far as, instead of horses, cows, and other cattle, to allow the said to be fed, and day pasturable sheep at the option of each person respectively having right of common; and to limit and stint the number of sheep each such person having right of common on such common pastures shall respectively feed and depasture thereon, in due proportion to their respective stints or rights. And, by sect., 21., declaring the improvement of the breed of sheep to be of great national importance, and that the turning of rams on wastes and common fields at certain times of the year has been found highly prejudicial, it is provided that no ram shall be turned upon, or be suffered to remain upon, any waste or common fields, between the 25th day of August and the 26th day of Nov. in every year.

* Common appurtenant arises from no connexion of tenure, nor from any absolute necessity, but may be annexed to lands in other lordships, or extend to other beasts, besides such as are generally commonable, as hogs, goats, or the like, which neither plough nor manure the ground. This not arising from any natural property or necessity, like common appendant, is, therefore, not of general right, but can only be claimed by immemorial usage and prescription, which the law esteems sufficient proof of a special grant or agreement for this purpose; see 2 Bl. Com. 33; Cro. Car. 482; Sir W. Jones, 396; S. C. 4 Vin. Abr. 590; F. N. B. 181. n; 5 T. R. 412. n; 4 Com. Dig. 84; 37 H. 6. c. 34. b; 15 Ed. 4. c. 33; Co. Litt. 122. a; 4 Rep. 37.

entitled to the said right of common in the place in question." It appeared in evidence, that the plaintiff was tenant to the lord of the manor of the closes, in respect of which the common was claimed, and of course, that as any right of common, which might have been antecedently appurtenant to these lands, became extinct by an union of them, which had taken place in the hands of the lord, with the soil out of which such common was claimed, the tenant could not claim the common in question in right of his land; as appurtenant, after such union had taken place. But inasmuch as the tenant, and his father before him, had for a long series of years actually enjoyed this common; it was contended before the Court, on the part of the plaintiff, that such enjoyment laid a foundation for presuming a new grant from the lord, and which presumption ought to have been left to the jury, supposing that any new grant could in point of law have sustained the allegation of common belonging and appertaining to the plaintiff's lands, which occur in all the counts but the last; and of his being entitled to common by reason thereof, which occurs in the last count.

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Per Cur. Upon consideration there does not appear to be any material difference in point of legal effect between the claims of common as made in these several counts, in all, the claim is in substance a claim of common appurtenant to the closes in respect of which the common is claimed. And the only question upon the argument, of which the Court wished further to consider, was, whether common appurtenant, for which, as is said in the text of Co. Lit. 122. one must prescribe, is, as suggested in the notes of the learned commentator, also claimable by grant as well as by prescription. It certainly occurs in favour of such claim by grant, that as prescription is only evidence of an immemorial grant, by which, in time beyond memory, the right then began to exist, it may equally begin to exist through the same medium, i. e. of grant, now shown, or fairly to be presumed, from usage, at the present day. The case of *Bradshaw v. Eyre*, Cro. Eliz. 570. which was a case similar to the present, as far as the extinction of common by unity of possession is concerned, did not afford an express authority for the creation of common strictly appurtenant, by a new grant at the present day. However, the case of *Sacheverell v. Porter*, in Cro. Car. 482. referred to in the fourth note upon Co. Litt. 122. but much better reported in Sir W. Jones, 396. is decisive upon the question. It appearing, therefore, from this pointed authority in confirmation of the reason of the thing, upon the principle that common appurtenant (such as was claimed by the plaintiff's declaration) may be created by modern grant; it was proper that the jury should have had the usage in this case, left to them, as a foundation whereupon they might or might not, according as the evidence of enjoyment would have warranted them, have presumed such a grant to have been made by the lord to the plaintiff or his father, as would have sustained the right claimed of common appurtenant in respect of these lands. And as this was not done, we think the nonsuit should be set aside, and a new trial granted.—See 26. H. 8. 4.

3. *LENIEL V HARSLOP*. M. T. 1671 K. B. 3 Keb. 66.

Upon a special verdict in an action upon the case for a common by the grantee of a common appurtenant, the following question arose, viz., whether a common appurtenant could be severed and granted; and the Court were of opinion that it might, observing, that there was no reason against such a grant, inasmuch as nothing restrains it to cattle used on the land.—See 26 H. 8. 4; Bro. Com. pl. 1.

And may be severed from the land to which it is appurtenant.

4. *SCHOLES V. HARGREAVES*. M. T. 1792. K. B. 5 T. R. 46.

In an action on the case for disturbing the plaintiff's right of common, it appeared, that the plaintiff was a butcher; that his house had neither land, cartilage, nor stable, annexed to it; but that under his shop window there was a sheep fold, which would contain four or five sheep at a time, but neither a

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This right may be appurtenant to a house or lands;

* For it shall be intended that a cartilage was belonging to the house; 2 Brownl. 101. And a messuage hath included in it yards, cartilage, and the like; 2 Show. 248; Sir T. Jones, 227. However, it is clear and agreed, that houses newly erected cannot have this right of common where it is claimed prescription; 2 Leon. 44; Ow. 4; 1 And. 151; al-

horse nor a bullock; it further turned out, that his father had always exercised common, but never without the occupation of some land; and the plaintiff's custom was, to turn out the sheep he did not kill on the preceding day, till the next morning. No *levancy* and *couchancy* being proved, as stated in the declaration, Lord Kenyon, C. J. nonsuited the plaintiff, and the court sustained the verdict; 1st, because there was no land on which cattle could be *levant* and *couchant*; 2d, because the right was claimed for all cattle: and even supposing a good right had been made out for sheep *levant* on the fold above spoken of, still no horse, nor bullock, (and the plaintiff had claimed a right for such cattle) could be kept there. See 11 H. 6. 12; 22 H. 6. 43; 37 H. 6. 34; 15 Ed. 4. 32. b; 10 H. 7. 7. 14, 1 Bul. 183; Ld. Raym. 716; and Woolrych, p. 58.

5. MUSGRAVE v. CAVE. H. T. 1718. Willes, 319.

And so as to appurtenant to and parcel of a manor with out land, where it is for a limited number, and in the hands of a copyholder.

It has been said that the possessor of the least cottage in Lincolnshire has common for 1000 sheep and that such a right is appurtenant and by prescription.

This right varies both as to the number of cattle,†

The dean and chapter of Ely prescribed for a common for ninety sheep, in the soil of another, which was parcel of the manor, and, according to the custom of the manor, was demised and demisable by copy of Court of Roll, taking care not to state their right as incident to arable land, there was a demurrer to this plea; but the court held that, first, this common was appurtenant; secondly, that as it was a copyhold grant, it still remained, in the eye of the law, attached to the manor even during the time of its being enjoyed. See Shep. Abr. 381.

6. LENTIL v. HENSLOP. M. T. 1671. K. B. 2 Keb. 66; 1 Ld. Raym. 407.

In this case the court said, that common might be enjoyed for a certain number of cattle without *levancy* and *couchancy* being an ingredient; as in Lincolnshire, the possessor of the least cottage hath common for 1000 sheep, which is appurtenant and by prescription, and need not be *levant et couchant*.

2. Of the variation to which this right is subject.

1. CHEEDLEY v. MELLOR. M. T. 1665. K. B. 1 Sid. 313; 1 Lev. 196; 2 Keb. 108. STONESBY v. MUSENDE. T. T. 1658. K. B. 2 Sid. 87; 1 Vent. 165; 1 Saund. 227.

To an advowry in replevin the plaintiff prescribed for common in the *locus in quo*, as appurtenant to certain land. Demurrer, on the ground that it was not said that the cattle were *levant et couchant*. On this ground judgment was given for the avowant, the Court observing, that a person could not prescribe in such a manner, the words used not being subversive of the idea that the common claimed was *sans nombre*, there not being any thing appearing to them to limit its extent. See 1 Rol. Abr. 393; 1 Saund. 346; Poph. 201; 1 Mod. 74.

though in the same case, where this point was decided, it was admitted that estovers might be used to rebuild an old chimney; Godb. 97; and that if one should build a new house upon the foundation of an old house having this right, or if a house should fall down, and the tenant or inhabitant should set up a new one in the same place; *ibid.*; or as has been said in another place, the right still remained; 2 Lev. 45; see Woolrych on Common, p. 5, 6, and 7; *vide ante*, p. 584.

* But if the lord of a manor grant common to A. for all his beasts, the common will be in gross; Sheph. Abr. 381.

† Common appurtenant to a manor may be for a certain number of cattle; F. N. B. 281. n. Again, this restriction may be wanting, and then the measure is regulated by the number of cattle *levant* and *couchant* (for the meaning of which term *vide ante*, p. 586) upon the land entitled to common; see Woolrych on Right of Common, p. 51. it being said that a prescription for all cattle commonable is not good: for thereby a man may put in as many beasts as he will; Mar. 83. Neither is it allowed to a grantee of common, *sans nombre*, to put in so many cattle as will prevent the grantor from having sufficient common on the land, for the frank tenement is not thereby in a commoner: 12 H. 8. c. 2. The commoner must also exercise reasonable discretion as to the species of cattle he depastures; for instance, it would seem, that the cattle cannot be those of another taken in by the commoner to agist: 30 Ed. 2. c. 27; 1 Ro. Abr. 401; Skin. 137; 2 Lev. 2; unless his right of common be for a certain number of beasts, in which latter case it seems that they may; 22 Ass. p. 84; 45 E. 3. c. 35. s. 3; 11 H. 6. c. 22; Cro. Jac. 575; 3 Keb. 66; yet he may borrow the cattle of another person for the purpose of manuring his land, and with these he may use the common; 14 H. 6. c. 6. b; Bro. Com. pl. 14: for he has hereby a special property in them: 2 Show. 328: 1 Skin. 137: so he may use the common with cattle which are for his household: 14 H. 6. c. 6. b: but not with any which are kept for the purpose of sale: *ibid.* On the contrary, a lord may license a stranger to put in his cattle, for it is no wrong to him, being the owner of the soil, because it cannot be a surcharging; 2 Saund. 327: see Woolrych on Right of Common, 61.

2. MUSGRAVE v. CAVE. H. T. 1741. C. P. Willes, 319.

In this case a prescriptive right of common was claimed and allowed by the Court, in Oldfield every year, in which it was sown with corn, from the time of cutting and carrying away the corn then growing until the said field was re-sown with corn, and every year when the said field had been fallow for a whole year.†

And the season of enjoyment.* [597]

3. Of the parties who may enjoy it.†

1. MILLER v. WALKER. T. T. 1670. K. B. 1 Sid. 462. S. P. CHEEDLEY v. MELLOR M. T. 1766 K. B. id. 313.

Upon demurrer in this case the Court held, that burgagers in a borough Burgagers, might have common appurtenant to their burgages by prescription.

2. HINKES v. CLARKE. T. T. 1679. 2 Show. 78. S. C. 3 Lev. 252.

On an issue that the freemen and inhabitants of ancient messuages have by Or freemen custom a right of common for so many beasts, a verdict was found establishing are entitled a right of common *modo et forma*, &c. and also that the freemen had right of to this right of common for 20 more. Upon writ of error the validity of the above custom was of com questioned, on account of the latter finding; but the Court rejected the latter men. § finding as surplusage, and affirmed the judgment of the Court below.

4. Of the mode in which it is to be enjoyed.

The rules which have been already adverted to in considering this species of common, will fully elucidate any doubts as to the mode in which the right is to be exercised, whether the question arose with reference to the sort of cattle put on the common, the number of the cattle, or the parties in whom the absolute or special property in the cattle is to be vested. *Et vide ante*. p. 596, &c.

[598] Common because of vicinage can only exist between one or more townships or manors lying contiguous;

3dly. As to common of pasture because of vicinage.‡

1. Of its nature in general.

1. Common because of vicinage is where the inhabitants of two townships, lie contiguous to each other, have usually intercommoned with one another; the beasts of the one straying naturally into the other's fields, without any molestation of either; see Inst. 122. a; 3 Cruise's Dig. 78; Bract. 222; Keb. 254; Brit. 144.

* Or the place in which it is to be enjoyed; Willes, 319.

† So a man may prescribe for common every year after May day; Cro. Jac. 580; Cro. Car. 482; Sir W. Jones, 396; or during every season of the year; 25 Ass. pl. 8; Bro. Com. 41; 1 Ro. Abr. 401. So when the custom was that for two years, when the land was sown, there should be common from the time of reaping the corn till the resowing, and that during the third year, when the land remained fallow, the common should continue throughout the year; it happened, that the land was not sown for seven years or more; and it was held that cattle might feed there during all the time it was not so; for according to the custom, when the owner had put in his cattle, he was not bound to remove them till the resowing of the land; 1 Freem. 23.

‡ There may be, in every case of this nature, special exceptions of particular persons who are entitled to enjoy the right of common; Ow. 4.

§ But an inhabitant of a town shall have this common by reason of his commorancy in an ancient messuage within that town, not having an estate or interest in the house, in respect of which he ought to have common: Cro. Eliz. 363; 6 Rep. 60; 15 E. 4. c. 29; Cro. Eliz. 180. 362; 1 Bulst. 183; Hob. 86; 2 Lev. 45; 1 And. 152; Godb. 97; Cro. Jac. 152; 1 Ld. Raym. 406; 2 Show. 78; 2 Lev. 2. Yet he may have it in a place where such right attaches, provided the cattle be *levant*, &c.; 15 E. 4. c. 32; Bro. Com. pl. 8; Bro. Prescription, pl. 28; Cro. Eliz. 363; 1 Ld. Raym. 406; 15 E. 4. c. 3: 3 Leon. 202; 6 Rep. 60; 4 Leon. 235.

|| A custom to go at shack, which signifies to go at large, prevails in the counties of Norfolk, Lincoln, and York; 7 Rep. 5; and is said to be a special manor of common for cattle, which is to be taken in arable land after harvest, until the land be sown again. It seems greatly to agree with the right called common vicinage. The general principle of each agrees, viz. that of intermingling commonable rights because of neighbourhood: both are to be claimed by prescription only: in both, when a custom to that effect exists, one proprietor may enclose against the rest. There seems, however, to be a distinction between the right and common because of vicinage, for the latter may be had in a waste, consisting of pasture; the former, on the contrary, is confined to a taking in arable land; and there is another difference, that the latter may be had throughout the year, the former only at the times of harvest and seed sowing. Any other doubts that may arise with a reference to common of shack will generally be materially elucidated by a reference to the

But not where there is in intermediate land.*

2. BROMFIELD V. KIRBER. E. T. 1705. K. B. 11 Mod. 72.

Holt, C. J. in considering the extent of the word *vicinus*, as applied to the case before him, which was an action of common of vicinage by the custom of a manor, said, that no common could be of this kind, unless where the inhabitants of one or more townships or vills lying contiguous, or the tenants of two or more manors adjoining to each other, had been accustomed to intercommon time out of mind, the commonable beasts of either straying into the other's fields, and under no circumstances could be shown to exist, when there was any land intervening between the commonable ground of the two litigant parties.

It is, however, properly speaking, only an excuse for a trespass;

3. MUSGRAVE V. CAVE. H. T. 1692. Willes. 322.

In a demurrer to this action, which related to a claim of common, the objection set forth was, that it did not appear whether the right amounted to common appendant, appurtenant, or in gross; and the Court, previously to their showing in clear and positive terms to which of these three species the right in question appertained, as asserted in the pleadings, made use of the following observations: the right of common claimed must range within some of these named; for, though common of vicinage has been mentioned, which is sometimes reckoned amongst the rights of common, there is properly no such right of common, but it is only an excuse for trespass. If it were a right, it would prevent an inclosure, which it has been always holden it will not.—See 2 104; 2 Buls. 187.

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And at most is but a prescriptive right.

4. BROMFIELD V. KIRBER. E. T. 1706. 11 Mod. 72.

There is a great resemblance between this right and the right of common appendant, and they have been used as synonymous terms.

Per Powell, J. Common of vicinage must be in nature of an escape, and so an excuse; for a man cannot put in his cattle in such common originally, but they must escape. This is exemplified by the fact, that those entitled to the privilege may enclose one against the other, if they choose to incur the expense.—See 1 Inst. 122. a.

But such doctrine is now completely obsolete;

5. It is said in 4 Co. 38. a., that this species of common is not common appendant but inasmuch as it ought to be by proscription, from time immemorial, as common appendant ought, it is in this respect resembled to common appendant.

6. When one who had land in one vill and common there with the tenants of the other vill, and title was to be made to common in a large field lying between the two vills, it was holden that it should be made as to common pur cause, &c. and not as to common appendant: Dy. 46; and see Dy. 316; 13 H. 7. 13; Co. Lit. 161; Poph. 201; 3 Keb. 388; 4 Rep. 37; Co. Lit. 122. a; 11 Mod. 73.

It is worthy of observation, that the proprietors of common fields may exclude each other if such has been the custom.†

7. HICKMAN V. THORNE. T. T. 28 Car. 2. C. P. 2 Mod. 104; S. C. 1 Freem. 210. S. P. BROMFIELD V. KIRBER. E. T. 1705. K. B. 11. id. 72.

Replevin. The defendant justified the taking, for that the *locus in quo* was his freehold, and that he took the damage there enfeasant. The plaintiff, in bar to the avowry, replied, that the *locus in quo*, &c. was parcel of such a common field, and prescribed to have right of common there, as appendant to two acres which he had in another place. The defendant rejoined, that there was a custom, that every freeholder who had lands lying together in the said common field might inclose against him who had right of common there, and that he had lands there, and did inclose. The plaintiff demurred. The C. J. and the whole Court were of opinion, that where there were several freeholders law connected with common of vicinage; see Woolrych on Rights of Common, p. 62. This species of common, it will be seen (*supra*) also differs from common appendant and appurtenant; for that no man can put his beasts therein, but they must escape thither of themselves by reason of vicinity, in which case one may inclose against the other, though it has been used time out of mind: Co. Litt. 122. a.

* If, therefore, there should be three vills, A., B., and C., and B. is in the middle between the other two, the vills of A. and C. may not intermingle, for they are not adjoining vicinities: Dy. 47. b.

† So the lord of one manor where a common of vicinage has existed time out of mind, may enclose against the lord of the other; Co. Litt. 122. a; which enclosure (except in the case of copyholders in the same manor) will bind the commoner; 4 Vin. Ab. 587. But in these cases the common appendant remains: 7 Rep. 5.

who had a right of common in a common field, such a custom as this of inclosing was good, because the remedy was reciprocal; for as one might inclose so might another. But Atkyns, J. doubted much of the case at bar, because the defendant had pleaded, this custom to inclose, in bar to a freeholder who had no land in the common field where he claimed right of common, but prescribed to have such right there as appendant to two acres of land he had *alibi*, for which reason he prayed to amend upon payment of costs. [600]

2. *Of the variations to which this right of common is subject.*

The season and place of enjoying the immunity of intercommoning may vary, as has been already shown they may do in the case of common appendant; see 19 E. 4 10; 21 E. 4. 41; 11 Mod. 72; 2 id. 104; 2 Bulst. 187; Dy. 47. b. But the intercommoning must take place at the same time, it being an essential ingredient in the existence of the privilege, that the advantages derived be reciprocal and concomitant, which they could not possibly be if one half were allowed to exercise his right at one season of the year, and another during another season; Dy. 47. b.

3. *Of the parties who are entitled to enjoy this right*

“It is said that no lord shall claim common pur cause, &c. except the lord who has possession of the town; for if there are twenty mesne lords, each is lord of the ville, and therefore a prescription that omitted to state seisin of the manor in the lord was holden bad. But Fitzherbert says, that one neighbour may claim common of vicinage in the land of another neighbour, although he be not lord of the town, &c.; see F. N.B. 180; D. Termes de la Ley, p. 157; Woolrych on Rights of Common, p. 49.

4. *Of the mode in which this right is to be enjoyed.*

It has been already seen, ante, p. 597. that commonable cattle can be alone put upon this common. The enjoyment of this right must also be restricted within reasonable limits; and the parties entitled to participate in the advantages to be derived ought to have a due regard to the reciprocal interests of one another; see 13 H. 7. 14; Bro. Com. 5. Upon this principle it was laid down in 7 Rep. 5. that common because of vicinage can only be used by cattle *levant et couchant* upon the lands to which such right of common is annexed; and it was expressly decided, if the commons of the towns A. & B. are adjoining, and there are fifty acres of common in the town of A., and 100 acres in the town of B., the inhabitants of the town of A. cannot put more cattle on a forest is their common than it will feed, without any respect to the extent of the common the privi in the town of B. *Nec e converso* [601]

4th. *As to common in a forest.*

1. *Of its nature in general*

WOOLDRIDGE v. DOVEY. Hard. 87; Sir W. Jones, 292.

A prescription was made for common in a forest. It appeared that the place where the common was claimed had been disafforested. The special verdict did not find that it had been made forest again, and judgment was on that ground given against the claimant; see 2 Show. 16; 33 Ed. 1. stat. 5. *ordinatio forestæ*; and 9 H. 3. c. 1. ch. *forestæ*. The exercise of this right may vary, as in other cases

2. *Of the variations to which this right is subject.*

1. The enjoyment of this right of common is so far limited, that goats, sheep, and swine, and geese are excluded; 3 Bulst. 313; Bridg. 26; and Manwood

* One species of stovers which used frequently to be hired in forests, was pannage, consisting of beach nuts, acorns, &c., and although these are the feed of swine which regularly have no place to common in a forest, yet they may be suffered to feed there by special prescription; see Woolrych on Right of Common, 105. and 111; see 3 Bulst. 313; Bridg. 26; Cro. Jac. 155; Hard. 87; 4 Inst. 298; 1 Lutw. 82; and Woolrych on Rights of Common, p. 107. or rights of this kind may vary, as in other cases

† And may be appendant, appurtenant, or in gross; see Woolrych on Right of Common, p. 104. and number of cattle.

‡ By 32 H. 8. c. 13. s. 2. it is enacted, that no stoned horse or horses being above the age of two years, and not of the height of fifteen hands, shall be put to feed on any common, chase, forest, &c. on pain of being seized on the property of the persons so taking the same.

even asserts that for these there cannot be a prescription; Manw. 100; but the contrary has been frequently decided; see 3 Bulst. 213.

2. *BIDDLECOMBE v. KERVELL*. H. T. 1761. K. B. 2 Burr. 1118.

And the sea-
son of the
year when
they are en-
titled to a
depasture.

Replevin upon a distress of hogs taken in the New Forest. Defendant made consuance as bailiff to the king, and justified the act of taking them as dam. feas. in the king's soil. Plea in bar, for that though the soil was the king's, yet that Ja. 1. granted to A. B. &c. a right of common for, &c. and pannage for hogs, &c. within the same forest, &c. at all times of the year, as well in the June month as at other times, &c.; except, &c.; and the plaintiff then deduced a title from A. B. to himself. The replication admitted the original right of common and pannage to have been as stated; but relied on the clause in the stat. 9 & 10 W. 3. c. 36. which was passed for the preservation of timber in the New Forest: "that every person having any right of common, of pasture, or pannage, or any privileges within the said forest, or any part thereof, should enjoy the same for the future, in manner following, viz. their said right of pannage between the 14th Sept. and 11th Nov. yearly, from and after Michaelmas, 1716, and not before; on forfeiture of any hog, pig, or swine, that from and after the feast of St. Michael next, and before the time aforesaid, shall be found in the wastes of the said forest: and their said right of common of pasture shall be and is hereby continued to them in and through such of the said waste ground of the said forest, at such time and times as the said shall not be inclosed as aforesaid; the time of the fence-month, (viz. 15 days before and 15 days after the feast of St. John the Baptist, yearly,) and the time of the [602] winter-heyning, (viz. from the 11th Nov. to the 23d of April, yearly,) excepted." It then stated, that the hogs, &c. were found damage feasant between the 11th Nov. and 23d April, &c. within the time of the winter-heyning; and that therefore the party had a right to take them damage feasant, &c. and did so, which he avowed and justified.

There was a rejoinder on a collateral point, to which there was a demurrer which called for the opinion of the Court as to whether the proviso in the act was intended to operate as an absolute deprivation of the plaintiff's right, or as merely to be in force subject to the performance of the act disclosed in the rejoinder. The Court gave judgment for the defendant in replevin, observing: it is clear that the statute meant that the right of common in the inclosed parts should be restrained absolutely, so long as they should remain inclosed; but be continued in the uninclosed parts only, under certain limitations and exceptions. These hogs were there found, at a time when they ought not to have been there, and must be consequently viewed as the proper subjects of a distress.

But it has been hold-
en, that it
is not neces-
sary in pre-
scribing for
common, a
dict had been
given for the
plaintiff.
A motion was
now made in
arrest of
judgment, on
the ground that
the prescription
was too large
and general, for
by the forest
law there is a
fence month,
in which it is
a forfeiture to
put in cattle,
which ought to
have been set
forth in the
plea. But the
Court, upon a
reference to the
case of Sir Edward
Sawyer, in Jones,
287, where it was
allowed to copy-
holders to pre-
scribe for common
generally gave
judgment for the
plaintiff.*

3. *TRIGG v. TURNER*. T. T. 1678. K. B. 2 Show. 9; S. C. 3 Keb. 746; S. C. 3 Lev. 98; S. C. Pollexfen, 443. S. P. *BRABROOKE v. CARTER*. 1 Lutw. 81.

Replevin. The defendant avowed as bailiff in distraining cattle damage feasant. The plaintiff in bar to the advowry pleaded prescriptions to have common, common at all times of the year in the place where, &c. being forest. A ver-
dict had been given for the plaintiff. A motion was now made in arrest of
judgment, on the ground that the prescription was too large and general, for
by the forest law there is a fence month, in which it is a forfeiture to put in cat-
tle, which ought to have been set forth in the plea. But the Court, upon a
reference to the case of Sir Edward Sawyer, in Jones, 287, where it was al-
lowed to copyholders to prescribe for common generally gave judgment for the
plaintiff.*

3. Of the parties by whom it may be enjoyed.

It is here sufficient to refer to the preceding part of this division, as there is no difference between this right and that of other commons as to the qualification of parties to enjoy it.

* Yet it seems, from Manwood, that only commonable cattle according to the forest law can be put into such common during the fence month, for he says that if swine, sheep, or goats, are found on the common during the forbidden month, they shall be forfeited to the king; Manw. 92; see Sir W. Jones, 283.

4. *Of the mode in which it is to be enjoyed.*

The species and number of cattle that may be put into forests for the sake of commoning, and the seasons during which such right may be lawfully exercised by the parties entitled to it, have been pointed out in the preceding pages, *supra*.

5th. *As to common in gross.*1. *Of its nature in general.*

STABLES v. MELLON. H. T. 1678. K. B. 2 Lev. 246; 2 Show. 43; Sir T. Jones, 115.

Case for disturbance of a burgess's common, and prescription that the mayor and burgesses have time out of mind had common for themselves and *quolibet eorum*. The prescription was traversed, and a verdict given for the plaintiffs. A motion was made in arrest of judgment, because the right of common was not laid to be appurtenant to any land.

Sed per Cur. This might be common in gross, and not appurtenant to any land. As if a man grant common to the mayor and burgesses for all their cattle in such a place, it is good as a common in gross, and not appurtenant. We must consequently give judgment for the plaintiffs. See 9 H. 6. 36; Co. Litt. 122, a; 4 Rep. 38; 2 Inst. 477; F. N. B. 180. N. notis; 2 Bl. 34. prescription;† it is a separate inheritance entirely distinct from any landed property, and may be vested in one who has not a foot of ground in the manor.

2. *As to what other commons are convertible into commons in gross.*

BUNN v. CHANNEN. H. T. 1813. C. P. 5 Taunt. 244.

In this case there was a right of common appurtenant for a certain number of cows. It appeared in evidence that the commoners were in the habit of letting their rights and so converting them into rights of common in gross during the time of such letting; and, according to the report, no objection was made to this mode of using the property, either at the trial or in the Court of Common Pleas; and the reason why that Court finally granted a new trial, was on the ground of the verdict being against evidence.

3. *Of the variations to which the right of common in gross is subject.*

1. BENSON v. CHESTER. M. T. 1790. K. B. 8 T. R. 396. ROGERS v. BENSTEAD. Sel. N. P. tit. Common.

* To secure the right to, to establish the validity of, and to enforce such grants, it is requisite that they should contain as clear and certain terms as possible; for although they will be construed in the same manner as other deeds of grant, and effect given to the intention of the grantor to be gathered, from the whole context and tenor of the instrument; yet such implication must be always rendered subject to the express terms and precise expressions used, although, by viewing the deed in such a light, it become even wholly nugatory and void. Where, therefore, common was granted to a man for all his cattle *levant* and *couchant* on Blackacre, and it appeared that the grantee had no interest in Blackacre, the grant was holden void; 1 Rol. Abr. 403. The same opinion was held where the grant was of common for all the grantee's cattle which should manure and feed on Blackacre, *ibid*. It was made a question, where there was a grant of common, where ever the beasts of the grantor should go, whether the grantee should have common after the grantor's death, for it was said, that after the grantor died, the beasts ceased to be his, and then the grant could not be complied with, 9 H. 6. c. 36.

† It is not inconsistent with prescriptive claims of common in gross, that the right should arise by deed, for in the former case a grant is presupposed, and it may be further observed, that such a licence cannot exist otherwise than by deed, see Woolrych on Rights of Common, cites Doctor and student, F. 18. a, 2 Ro. Abr. 63, 2 Keb. 410.

‡ Neither common appendant nor common appurtenant for cattle *levant* and *couchant* can be turned into common in gross, see 1 E. 3. 1, 4 F. 46, 9 E. 39, 26 H. 8. 4, 1 H. 7. 24, 27 H. 8. 12, 5 H. 7. 7, 19 H. 6. 33. B, 11 H. 6. 42, Bro. Com. pl. 28, Cro. Car. 14. 432. 542, Winch. Rep. 45, 2 Lev. 67, S. C. 3 Keb. 66, 2 Saund. 327, *et vide supra*.

§ Where one prescribed in a *que* estate for a fold course, viz. common of pasture for any number of sheep not exceeding 300 in a certain field as appurtenant to the manor of D., it was holden that this fold course might be granted over, and so converted into common in gross, for the number of cattle was ascertained, and the severance would, therefore, be no prejudice to the owner of the land. and he may do this, although the land be stated in the grant to be parcel of the manor, Cro. Car. 422, S. C. Rol. Abr. 402. So where one claimed common in gross for a certain number of cattle, or the sole pasture of certain herbage, it was agreed that he might license a stranger to put in his beasts, 2 Lev. 327, and see 1 E. 3. 1, 11 H. 6. 22, 27 H. 8. 12.

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Common in gross is such as is neither appurtenant nor appurtenant to land, but is annexed to a man's person, being granted to him* and his heirs by deed, or it may be claimed by

Questions have arisen as to what commons may be changed to commons in gross.† It would seem that common appurtenant for cattle not *levant et couchant*, is convertible by

In an action on the case for disturbance of common, the defendant attempted to give in evidence a right of common without stint or servitude, in respect of what was called an ancient house, without any land annexed to it. The judge who tried the cause refused to receive it, being of opinion that such a claim could not be supported in law, and the Court granted for a new trial, expressing the same opinion. See 1 Rol. Abr. 338; Martin, 23; 2 Lev. 17; 1 Lev. 196; S. C. 1 Sid. 313; Cro. Eliz. 458; 3 Mod. 162.

And the court held that a right of common without stint cannot, however, exist, as annexed to a messuage without land.

2. *BENNETT v. REEVE*, M. T. 1740. C. P. Willes, 201; Hardres, 117.

Per Willes, C. J. The notion of common is confined to the latitude in which it was granted, understood, and long since been explained, and it can have no rational meaning but in contra-distinction to stinted common. See 22 Ass. Pl. 55; 25 Ass. Pl. 56; 30 Ass. Pl. 51.

3. *WHEELER v. WILKINSON*, M. T. 17 W. 3. K. B. 1 Ld. Raym. 405.

The plaintiff declared that he was an occupier of a house for ten years in D., and that there was a custom within the town of D. that all inhabitants and occupiers of houses within the said town ought to have common for all commonable cattle in a certain fen; and that the plaintiff, by reason thereof, ought to have his common, &c. To this declaration the defendant demurred generally; and the Court gave judgment against the plaintiff, because he did not show that the custom had some reasonable commencement. It was said, however, by Powell, J., that though the general stint of common was by levancy and couchancy, a man might grant at that day common in gross *sans nombre*; and further, that the custom at issue could not commence by grant, being laid on the inhabitants and occupiers, who were incapable of taking by grant. And the Chief Justice admitted that such a grant could be made, although the grantee could not grant it over. See Shep. Abr. 381.

4. *MELIOR v. SPENCER*, M. T. 169. K. B. 1 Saund. 339; S. C. 2 Keb. 527, 55; 570 S. P. *MELIOR v. WALKER*, 2 Saund. 1. Semb. S. P. *STAPLES v. MELIOR*, 2 Show. 43; 2 Lev. 246; Sir T. Jones, 115.

In trespass the defendant pleaded that the mayor and burgesses of the corporation of D.— had common for all their commonable cattle in a certain field. The Court gave judgment that the plea was bad because it was not said that the cattle were *breed et couchent* within the town; and Kelyng, C. J. who, on a former day, had intimated his opinion that if this right were not regulated by levancy and couchancy, within the town, the corporation would surcharge the common, said positively that there could not be any common in gross without number.

* And it is clear that there cannot be either appendant or appurtenant commons of such a nature, for the measure by which they are ascertained, when unlimited, is levancy and couchancy, see 1 Ro. Abr. 348, March. 63. 2 Sid. 87, 1 Lev. 196, S. C. 1 Sid. 313, Cro. Eliz. 458, 3 Mod. 162.

† Even so early as the Year Books, the same doctrine seems to have obtained, for in 11 H. 6. c. 22. b. Babbington, C. J. (alluding to a claim of common, *sans nombre*) said, that it could not mean a claim for feeding innumerable beasts, but for a number not certain, so that if one were disused of such a common, he might bring an assize of common *sans nombre* according to the deed, since he would not claim a right for a defined number of cattle, 11 H. 6. c. 22. b. And this opinion is explained by Rooke, J., 12 H. 8. c. 2., and Lord Coke explains the same doctrine, when he says that there may be common *sans nombre* in gross, and yet that the tenant of the land must common or feed there also, Co. Litt. 122. a., see Woolrych on Right of Common, p. 76.

‡ "It is to be observed," says Mr. Woolrych, in his Treatise on Rights of Common, "that with the exception of C. J. Kelyng's dictum, there is no absolute denial of the existence of common in gross without number, for with regard to the observation of C. J. Willes, in *Pennett v. Reeve*, *supra*, p. 604, it is to be remarked, that he was endeavouring to destroy the authority of some old cases, which he said seemed to imply that levancy and couchancy was necessary only in the case of common appurtenant, not of common appendant; and then he added, that this term *sans nombre* was put in contra-distinction to stinted common. So that it appears that a notion formerly prevailed that one might have common appendant *sans nombre*, which he denied, but did not touch the point of common in gross *sans nombre*. With respect to authorities, many have been cited which

5. SMITH v. PEVERILL. H. T. 1674. C. P. 2 Mod. 7.

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In this case it was admitted, that a man may prescribe for all manner of beasts by reason of his person. But North, C. J. said, that a distinction ought to be taken between a general licence to feed cattle, and a licence for a particular time; that in the former case commonable cattle were the subjects of such a licence; in the latter, other cattle, hogs for instance, might be included. See 15 E. 4. 33; Bro. Prescription, st. 28.

4. Of the parties who may enjoy it.

"A common in gross may be prescribed for by the parson of a church, or the like corporation sole; 2 Bl. Com 34; so by the mayor and burgesses of a corporation; 1 Saund 343; 2 Lev. 246. But inhabitants, or occupiers, as such, cannot have such a right, because they are incapable of taking by grant; 15 E. 4. 29. 33; 1 Lord Raym. 407. Nor the king, for he might surcharge the land; 27 H. 8. 10. B.; Dowe's Rep. 2. And it has been decided, that the lord shall not have a villein's common *sans nombre*, lest he should injure the tenants by his unlimited right; Davis' Rep. 2." See Woolrych, 73. A prescription for this right must be established by immemorial usage; hence it appears, that a lessee for years cannot prescribe for such a common, since the imbecility of his interest requires that he should plead a *que* estate; Cro. Car. 599.

distinctly recognize this independent right; and the comments of eminent law writers, confirming those authorities, might be cited. Lord Coke speaks of this right as existing and good, if the tenant of the land, that is, the owner of the soil, feed there also; Co. Litt. 122. a. Fitzherbert also recognizes it; F. N. B. 125. b. And Blackstone, in his Commentaries, notes this species of right as possible in law, but as one which, in fact, does very rarely exist; 3 Bl. Com. 239. The opinion of Sir John Kelyng alone remains; and it might at all events be too much to say, that his *obiter dictum*, however entitled to attention, should outweigh the current authorities. However, on examining the case, it will be found that the great objection which the Court then entertained to the prescription before them was, that the corporation might surcharge the common, if the measure of levancy and couchancy did not restrain them. But speaking on the reason and principle of so general a licence, it certainly would be strange if lords of manors could not grant an unlimited right of common; for an ample remedy is open to the commoner by an action on the case, if he be unable to enjoy his feeding sufficiently; and to the lord by trespass, or perhaps distress, damage feasant, if there be a surcharge; for it is clear that the owner of the soil must feed, notwithstanding the grant of common *sans nombre*. On the whole Sir W. Blackstone's words seem very appropriate, when he says, that the right is very scarce, though possible in law;" see Woolrych on Rights of Common, 80. n.

* The following question also naturally arises, "in whom must the property of cattle allowed to eat herbage from a common in gross exist?" It was early decided, that a commoner not having beasts of his own could not agist those of others on his common; see 45 E. 3. 25. b.; Seisin, pl. 5; 1 Rol. Abr. 402. 22 Ass. pl. 84; Bro. Compl. 46; F. N. B. 180. R; 11 H. 7. 7. B. But if a grant of common be made to a man who has not any, for which reason he takes the cattle of another, and receives livery and seisin of tee beasts, common from the grantor, who is present when such cattle are put in, and who gives his assent thereto, such a seisin will be sufficient; 45 E. 3. 26; and although it was said in argument that if one had a grant of common for three cows during one year, he could not put strange beasts on the waste; 18 E. 4. 14. B; it seems from Fitzherbert, that the cattle of a stranger may be used by a man having a common in gross for a certain number of beasts; 11 H. 8. 22. B. or a common in gross *sans nombre*; F. N. B. 180. b; see Woolrych on Right of Common 82.

The season for enjoying this common depends on the usage which is prescribed for, and when claimed by grant, on the deed of the grantor; 9 H. 6. 36; Bro. Com. pl. 3, Fitzh. Com. pl. 2. 1 Ro. Ab. 404. Perk, sec. 109. 1 Rep. 87, Bro. Grants. pl. 5, Cro. Car; 599, ——— v. Stringer, 17 E. 3. 26, 1 Rep. 87, Hob. 40. That these grants are strictly expounded will appear from a case where it was said in argument, that if common be granted for 10 beasts to A. during each year of his life, and A. does not use the right for two years, he shall not, therefore, put 30 beasts into the land to depasture them during the third year, and the Court were of the same opinion, 27 H. 6. 10. As to the place in which the right is to be taken, a claim by prescription follows the usual rule, as in other commons, but a claim by grant is according to the words contained therein. It is necessary that some place should be specified in the grant, for otherwise it will be void, 9 H. 6. 36. But it is sufficient that it be generally mentioned, as throughout a manor, in certain lands, &c, see F. N. B. 180, G, 27 H. 8. 12, 17 E. 3. 34, B. Cro. Car, 599, yet under a general grant, as of the depasturing all cattle throughout a manor, the grantee shall not go into the garden of the grantor, nor into his corn, but only into those places which

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Common of estovers is a right of taking necessary house bote, plough-bote, and hedge-bote from the estate of another.*

5. *Of the mode in which it is to be enjoyed* *Vide ante*, p. 603.

(B) AS TO COMMON OF ESTOVERS.

1st *Of its nature in general.*

1. Common of estovers is a right of taking necessary house-bote, plough-bote, and hedge-bote, in another person's woods or hedges, without waiting for any assignment thereof. Every tenant for life, or years, has a liberty of this kind of common right in the lands which he holds, without any express provision of the parties: but this right may also be appendant or appurtenant to a messuage or dwelling-house by prescription, or by grant, to be exercised in lands not occupied by the tenant of the house; as if a man grants estovers to another for the repair of a certain house, this right becomes appurtenant to that house; so that whoever afterwards requires it, shall have such common of estovers; and if the owner of the house grant the estovers to another, reserving the estover to himself, the estover shall not be thereby severed from the house, because they must be spent on the house; Plowd. 381. This right can only be claimed by grant or prescription, except by copyholders, who may well entitle themselves to it by custom. But as custom to take a profit *in alieno solo*, except in the case of copyholders, has been holden bad, it follows, that a claim to take estovers from the waste of a third person cannot be established that way. See 2 Bl. Com. 35; Com. Dig. 80; 13 Rep. 68; Bract. 136. 7. 222 & 231; 6 E. 1. 4; West. 2. c. 25; Bac. Ab. tit. Common; Flet. 255. 266; Brit. 153; 1 Buls. 194.

2. *SEILBY v. ROBINSON.* H. T. 1788, K. B. 2 T. R. 758.

Trespass was brought for breaking closes cutting down boughs, wood, and underwood, and carrying away the same; the defendant justified under a custom, that all the poor householders within the township of W. had been accustomed, from time immemorial, to take estovers from the closes mentioned in the declaration for necessary fuel to be consumed in their respective dwelling houses within the township. This custom was traversed by the replication, and found for the defendant; but the court on an application to set aside the verdict, said that the custom was too vague and uncertain, and could not be supported; that, if the defendant had stated on the record that he was seised of a certain ancient tenement, and so had prescribed on a *que* estate, (thereby limiting the benefit to the houses to which the prescription would apply), it might have been otherwise; but that, as the case stood, there was not any limitation.

3. *BEAU v. BLOOM.* M. T. 1773. C. P. 3 Wils. 456; 2 Bl. 926.

It has been also holden that a custom to cut rushes as annexed to a right of common may be supported.

This was a special action on the case, for disturbing the plaintiff in his right of common, and right to cut and take rushes upon the common for litter for his cattle, by an ancient custom. A verdict was found for the plaintiff. A motion was now made in arrest of judgment; when it was argued that the plaintiff's claim to cut and take the rushes on the waste for litter for his cattle, as a right of common, is a right of common, and not a right of common. The court said, that he may use of common right, 9 H. 6, 36, *per* Babington, Bro. Grants, pl. 5, 1 Ro. Ab. 404, 3 Keb. 244. Still if the grantor put his cattle into his garden or his corn, and the grantee has a licence to go wherever the grantor's cattle are put, clearly the cattle of the grantee may be put into these latter places. 9 H. 6, 36, 1 Ro. Ab. 403, 404. And under the above general words they may go into any place where the cattle of the grantor feed, *ibid*. But if the grantee never fed his beasts in any place before the grant, at the time of the grant, or since no benefit passes to the grantee, *ibid*, Perk. 109, on the contrary, if the grantor have at any time occupied the land mentioned in the grant, although afterwards he have not any beasts, the grantee shall have the common, *ibid*, Bro. Grants, pl. 5.

* The taking must, however, in all cases be reasonable; Bract, 231; Flet. 266.

† For it has frequently been decided, that if a man have such a common by grant, he cannot build new houses; F. N. B. 180. H; or hedges: 1 Bulst. 94; or convert the premises to other purposes: 4 Rep. 86; and so entitle himself to common in respect of them. But if a house, having such a right attached to it, be pulled or fall down, and rebuilt on the same or another place; (Godb. 97; Sty. 446; Hob. 40;) the prescription is not thereby destroyed. The same principle extends to parts of a house or premises: see 4 Rep. 87. So previously to the last rule it was adjudged, that if a house be enlarged, or more houses or chimneys be built, the estovers should remain to the old houses and chimneys, but should not extend to the new; 4 Leon. 241; 2 Ld. Raym. 1400.

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right appendant to his right of common, could not be in its nature and quality, for a thing *incorporeal* could not be appendant to a thing *incorporeal*.

Sed per Cur. The right to cut and take the rushes is only a circumstance attending, or part of the right of common. Both together may be reasonably taken and considered as one united right.—Judgment for plaintiff.

2dly. Of the variations to which this right is subject.

1. FISHER v. WREN. M. T. 1688. C. P. 3 Mod. 250.

Declaration in trespass on the case, for disturbance of a right vested in the plaintiff of cutting the willows growing there for the mending of their houses. Upon not guilty pleaded, there was a verdict for plaintiff. A motion was now made in arrest of judgment, when exceptions were taken unconnected with the point which it is here wished to illustrate. See 1 Bac. Abr. tit Common.

2. The period when this right may be exercised is not pointed out specifically as invariably happening at the same period in different manors, even locally situate, so as to render it a matter of presumption that uniformity might be supposed to exist; on the contrary, the privilege is guided and regulated by the usages of each distinct manor. Thus there may be a prescription for estovers, between the feasts of St. Michael and Christmas; 10 E. 4. 2 B. Brit. 153. So to take them throughout the year, except in fawning time; 2 Leon. 209; 3 Leon. 218. Again, the usage may be that estovers shall not be taken except by the view and delivery of the bailiff, or of the lord and the bailiff; 8 E. 3. 54.; 5 E. 3. 64. B. 65; 5 Rep. 25.

3d. Of the parties who may enjoy this right.

1. WHITE v. COLEMAN. M. T. 1672. K. B. 3 Keb. 247.

In this case, which was an action of trespass by a person stating himself to be an inhabitant of an ancient messuage in C., it appeared that C. was an ancient borough, and that the corporation, for themselves and inhabitants, had common of turbary out of the moor in which the trespass was committed, *quilibet ad libita sua*, every year in their own houses. A verdict was found for the plaintiff. A motion was now made in arrest of judgment, on the ground that it was not averred that the plaintiff was a burgess, he being only said to be an inhabitant and not a tenant to the corporation. *Per Cur.* The prescription is too general and uncertain; where the right of common is vested in the corporation, an inhabitant cannot prescribe as such. The only way for them to substantiate such a right is for other persons, such as a mayor and burgesses, to plead it for themselves and the inhabitants of such a place. Generally speaking, a minor degree of certainty, viz. that to a common intent, is sufficient in a plea in bar. There are, however, many instances in which a greater degree of certainty is requisite in a plea than in a declaration, which removes the objection that has been taken, that such a minute description as we here hold is necessary, would not have been required had the party been plaintiff instead of defendant. For instance, in a declaration claiming a right of way, or other easement, it is sufficient to state, that plaintiff, by virtue of his possession of a messuage, &c. is entitled to such easement, without setting forth the particulars of the plaintiff's title; but, in a plea justifying an entry into land, &c. in respect of such easement, it is necessary to set forth the right by prescription or grant, &c. which in this as in other instances, renders minuteness indispensable.

* In the case of fire-bote, grants of that right have been, where the terms of it were repugnant to such a construction, construed so as to render great wood, such as oaks, available, where small wood could not be had; see 8 Leon. 16. 218; Perk. 51; 10 E. 4. 3; Bro. Com. pl. 31.

The grantees of estovers can only take the wood which he cuts himself; Mo. pl. 561; 1 Bulst. 95; Yelv. 188, Cro Jac 256, 1 Brownl. 220, not that which has been already cut. If, therefore, the grantor should cut down all his wood, and thus render his grant inefficient, there is not any remedy, but an action on the case for the injured party, Cro. Eliz. 620, 1 Brownl. 220, Mo. pl. 561.

† In general the occupant of a house shall have estovers if he show a prescriptive claim or a grant, entitling him thereto, Vaugh. 190. So copyholders may have such right, if a custom to that effect has existed in the manor, 1 Leon. 272, Mo. pl. 727, Cro. Eliz. 629, Godb. 178, 1 Rol. Abr. 560, 12 Ves. 380, 2 Saund. 320, 1 Vent. 128. 163, 2 Brown. 329, Co. Litt. 164. 165.

The privilege of taking estovers may be either amplified or confined; in most cases it applies to the taking of underwood shrubs, &c. but there may be prescriptions to a much greater extent.*

The time of enjoying this right varies according to the usage of different manors.

Inhabitants cannot prescribe for estovers in that capacity.*

[610] 2 REX V. THE INHABITANTS OF WARKWORTH. E. T. 1813. K. B. 1 M. & S. 473.

And lately a custom was stated in a reserved case under the poor laws for freemen to take peats upon Alnwick Moor for their own use.

A pauper, as freeman of a town, was entitled during his residence there, together with the other freemen, to a stinted common of pasture on a neighbouring moor for his own cattle, and also to a right to cut peat, furze, turves, and bushes, for his own use, and get limestones, &c. on the moor, and to put his children to the town-school free of expense, at which two of his children were placed at the time of his removal; but it did not appear that he had ever exercised the common of pasture, or had any cattle wherewith to exercise it. The question which arose was, whether the rights of the pauper amounted to an estate, from which he was not legally removable under the stat. 13 & 14 Car. 2. c. 12. The Court held that he clearly was, observing: in order to determine this case, we must enquire what right the pauper had. Now it appears that he had neither land nor house; it is said, however, that he had a right of common; but supposing he had, it does not appear that he was ever in the enjoyment of, or had any cattle wherewith to exercise, that right. The profit *aprendre*, or easement, as it has been called, never existed in him; how then can he be said to have been resident on his own?

4th. *Of the mode in which the right is to be enjoyed.*

The last point is, how the estovers when obtained are to be spent; and as an universal rule the expending must be on the premises which give the right to take them; 7 E. 4. 27; 12 E. 4. 8; Law of Commons, 1720, p. 48; Clayt. 47; 8 Rep. 54. It was early decided, that profits granted out of a waste could not be sold; 17 E. 3. 7; and this doctrine has been since adhered to; 11 H. 6. 11. B; Clayt. 47; 5 H. 7. 7. B. per Fairfax. The manner of using estovers, even on the premises, has been the subject of much argument. The result of the cases, however, seems to be, that it is lawful to repair any part of ancient premises, and to rebuild them if destroyed, or fallen down with such estovers, but not to raise any new building, or new erection on an old building, with them; see 10 E. 4. 3; 4 Rep. 87; 2 Ld. R. 1400; 1 Lev. 167. 291; 1 Vent. 237; 2 Lev. 44; Godb. 97; Freem. 174; Cro. Jac. 246; Yelv. 187; 1 Bulst. 93; 1 Brownl. 219.

(C) AS TO COMMON OF TURBARY.*

1st. *Of its nature in general.*†

1. Common of turbary is a right to dig turf upon another's land, or upon the lord's waste. This kind of common can only be appendant to a house, and not to land; for turf is to be burned in a house; nor can it extend to a right to dig turf for sale; 4 Co. 37. a; Noy. 145; and it may be in gross; see 2 Bl. Com. 35; 3 Cru. Dig. 89. tit. Common; 5 Ass. pl. 9; 7 E. 3. 43; 1 Sid. 354.

Common of turbary is a liberty of digging turf upon the ground of another.

2. HAYWARD V. CUNNINGTON. H. T. 1666 K. B. 1 Lev. 231; S. C. 1 Sid 354; S. C. 2 Keb. 290. 311.

[611] To be expended on the premises in respect of which it is claimed.

Plea to an action of trespass for digging turf; that the party was seised of an ancient messuage, showing a prescription to have every year as much turf as two men could dig in one day, as belonging to his messuage. Demurrer assenting for cause, that it did not appear that this turf was spent in the house. The Court gave judgment against him, on the ground that as he had claimed by appendancy, he ought to have applied his claim to some tenement to which it ought to be appendant. See 5 Ass. 9; 7 E. 3. 43. B.

2d. *Of the variations to which this right is subject.*

FAWCETT V. STRICKLAND. H. T. 1737. C. P. Willes, 57; S. C. 1 Com. 577.

* This licence must, like that of estovers, be claimed by grant or prescription; 1 Taunt. 447, except that where it is pleaded by a copyholder, he should allege it by way of custom.

† In Scotland, in those districts where there is no coal, the inhabitants are chiefly supplied with fuel from the mosses with which the country abounds. Where one estate has only a small quantity of this moss, it is not unusual for a proprietor of a neighbouring estate, where there is a superfluity, to sell to the proprietor of the defective estate a perpetual liberty to his tenants to cut moss for fuel, on a certain annual rent, per fine or finality, (which terms are synonymous.) and this is called "an heritable moss tolerance," see Dingwall v. Farquharson, Dom. Proc. Journal. sub an. 1797.

A replication stating a right of turbary was objected to, on the ground that the plaintiff did not entitle himself to take turves in a certain enclosed part of the common, as common of turbary did not extend throughout the whole waste. But the court held, that a man may certainly have a common of turbary throughout the whole common, as well as common of pasture, though he cannot enjoy his right of common of turbary in those parts of the common where there are no turves, any more than he can enjoy his common of pasture in those parts of the common where there is no grass.

3d. Of the parties who may enjoy it.

The general rules which have been already shown to prevail in other cases of common, attach in the particular instance of common of turbary; *vide ante*, p. 590, 609. A mere occupant cannot, therefore, claim this immunity; 2 Atk. 189; but it seems that a mayor and burgesses may prescribe to have it for themselves, and the inhabitants of such a place; Freem. 184; and it seems that a freeman may plead a custom to take turves for his own use; 1 M. & S. 474. *abridged ante*, p. 609; and see Woolrych, 98.

4th. Of the mode in which it is to be enjoyed.

WILSON v. WILLES. H. T. 1806. K. B. 7 East, 121; S. C. 3 Smith's Rep. 167.

To an action of trespass the general issue was pleaded; and further that the close upon which it was alleged in the declaration the trespass had been committed, was, and from time immemorial had been, a certain large waste situate within, and parcel of the manor of H., within which there is, and had been, divers customary tenements, demised and demisable, &c.; and that there was and had been a certain ancient and laudable custom, that all and every the customary tenants for the time being of all and every the aforesaid customary tenements parcel of the said manor, having a garden or gardens, part of the same respectively, from time, whereof, &c. have dug, taken, and carried away, in, upon, and from, the said close, to be used and spent in and upon the said customary tenements, respectively, for the purpose of making and repairing grass plats in the garden, parcels of the same respectively, for the improvement thereof, such turf covered with grass fit for the pasture of cattle, as hath been fit and proper to be so used and spent, every year, at all times in the year, and as often and in such quantity as occasion hath required, as to their said customary tenants, with the appurtenants respectively belonging. The second special plea alleged, more generally, the same right in the customary tenants to dig, take, and carry away, the turf to be used and spent in and upon their customary tenements, &c. in and for the improvement of the gardens parcels of the same respectively, without confining the improvement to the making and repairing of grass plats therein. The defendant pleaded a further justification, stating a similar right to the customary tenants to dig, take, and carry away to be used and spent in and upon their customary tenements, for the purpose of making and repairing the banks and mounds, in, of, and for, the hedges and fences thereof respectively, such being covered with grass fit for the pasture of cattle, as hath been fit and proper to be used every year, at all times of the year, as often and in such quantities as occasion hath required. And lastly, a custom was relied on for the tenants of customary tenements within the manor, having dug and taken away from the *locus in quo*, by themselves, and their farmers, &c. to be used and spent in and upon the said customary tenements for the improvement thereof, such turf covered with grass fit for the pasture of cattle, as hath been fit and proper to be so used and spent. Demurrer and joinder.

Per Cur. All the customs are too general. They are stated "for improvement;" but what sort of improvement is meant? It is not agricultural merely; one man may choose to cover the whole garden with grass, and every part of the ancient tenement may be covered with grass at the expence and to the injury of the commoners. Then the two rights must necessarily interfere.—There ought to be some limitation. "As occasion shall require." It is not stated what occasion, and therefore it resolves itself into the occasion of the

- [613] party who claims it. Neither is it claimed for the repairing of ancient banks and mounds, but it may be for any transient and temporary subdivision of the land, at the will of the tenant. All these customs are, therefore, too indefinite and uncertain to be sustained.—Judgment for plaintiff. See 6 T. R. 741, 748; 2 T. R. 391; 5 T. R. 411; 2 Lev. 2; 2 Atkins, 189; 45 Ed. 3. 25, 26; Bro. Com. 48. Cited 12 H. 8. 2; and see 13 H. 8. 15, 16; 4 Rep. 37; 2 Str. 1224; 1 Wils. 63; Co. Litt. 122; 2 Bl. Com. c. 3. tit. 3; Noy. 145; 1 Lev. 231; S. C. 1 Sid. 354; S. C. 2 Keb. 290, 311.

(D) AS TO COMMON OF PISCARY.

1st. Of its nature in general.

Common of piscary is a right to fish in the soil of another; or in a river running through another's land. and Lord Coke says, that this kind of right does not exclude the owner of the soil from fishing. Like other commons, it may be appendant, appurtenant, or in gross; 34 Ass. pl. 11; where the right is appendant or appurtenant, it should be claimed in respect of the tenements to which it belongs; where in gross, it is claimed generally by virtue of the deed; see Woolrych on Rights of Common, p. 104.

2. WARD v. CRESWELL. T. T. 1741. C. P. Willes. 265.

Or, more strictly speaking, the rivers of a third person.* Replevin for taking six boat-oars: the defendant avowed the taking, damage feasant, saying, that *locus in quo* was his soil and freehold. The plaintiff, amongst other pleas in bar, pleaded a prescription in a *que* estate, that one E. C. had common of fishery, with his farmers and servants, with two boats in the sea, every year, at all seasonable times, in respect of certain tenements of which he was seised in fee; and then said, that by the command of E. C. he used the common, and put the oars on the *locus in quo*. To this and another plea of a more general nature, the defendant demurred; and the Court were clearly of opinion that both pleas were bad, on the ground that the right claimed was a general right for all the subjects of the kingdom. In Noy. 20. it was agreed that a man shall not prescribe in that which the law of common right gives. This is not merely the law of this country; it is the law of nations. A man might as well prescribe that he, and all those whose estate he has, have a right to travel on the king's highway as appurtenant to his estate. See Grot. de Jure Belli et Pacis, b. 2. c. 3. s. 9; Bracton, l. 1. c. 12. s. 6.

2dly, Of the variations to which this right is subject.

Common of piscary is a privilege which may be claimed at all seasonable times of the year, subject, of course, like other immunities of the same nature, to the usage of different local districts.

3dly, Of the parties who may enjoy the privilege.

- [614] All persons capable of taking commonable rights are competent to enjoy a common of fishery. And the lord cannot be shut out from the right, unless by a special prescription; 1 Inst 22. a. He may, therefore, take it at any extent, so as he does no injury to his tenants; see 2 Salk. 637; 2 Bl. Com. 39.

4thly, Of the mode in which it is to be enjoyed.

In conformity with the original intention of the grant of common of piscary. viz. for the maintenance of the tenant's family, it would appear incongruous that parties in whom such a right may be vested should have the power of otherwise appropriating or applying, either to their own benefit by sale, or to the advantage of others by mutual participation, the produce of such incorporeal hereditaments.

IV. RELATIVE TO THE PRIVILEGES AND DISABILITIES OF THE PARTIES INTERESTED IN THE WASTE.

(A) AS TO THE PRIVILEGES AND DISABILITIES OF THE LORD.

1st. To use the common in general.

- Any act of ownership may be exercised by the lord on his waste; 1. DOE, DEM. LOWES, v. DAVIDSON. M. T. 1813. K. B. 2 M. & S. 175. Per Lord Ellenborough, C. J. The lord has an entire dominion over the soil, subject to the commoner's right of common. He may use his waste in a very amplified manner, by depasturing his own cattle or those of strangers, or may, * The privilege must in all cases be limited within proper bounds: see 6 Mod. 73.

in various ways, contract the liberty which the commoner has upon open grounds. See 3 Cru. Dig. tit. Common; 18 E. 3. 42; 18 Ass. pl. 4; Co. Litt. 122. a.

2. SMITH V. FEVERELL. H. T. 1673. C. P. 2 Mod. 7; S. C. 1 Freem. 190.

S. P. BIRCH V. WILSON. M. T. 1676. C. P. 2 Mod. 274. S. P. WOOL-

TON V. SALTER. E. T. 1683. 3 Lev. 104.

The plaintiff complained that he was disturbed in the enjoyment of his common by the defendant's cattle; the defendant pleaded a licence from the lord of the soil, without alleging that sufficient pasture was left for the commoners. The Court were of opinion that judgment should go for the plaintiff, for they said that the lord cannot let out so much to pasture as not to leave enough for the commoners. Provided the interest of the commoners be not thereby injured;

3. POTTER V. NORTH. M. T. 1668. K. B. 1 Saund. 347. [615]

Action of replevin. Avowry by defendant taking cattle, damage feasant; and the plaintiff replied a prescription for the sole and several pasture in the *locus in quo*, which was demurred to. It was urged for the defendant, that if there should at any time be a surplusage, the lord could neither improve nor feed if the plaintiff's prescription were allowed; that, if a stranger committed a trespass, the lord could not have an action, but the tenants, who must either join or sever; that, if they joined, the number of plaintiffs would be enormous; if they severed, and were nonsuited, innumerable vexatious actions would arise; that, if a freehold were purchased by the lord, or escheated, or a copyhold determined, the lord could not have any benefit in the lapsed share, and that the tenants would in this way be enabled to resist all improvements. For the plaintiff it was said, that this was first the usage of the copyholders, which did not exclude the lord, and then the grant of the lord to the freehold tenants took place, whereby he excluded himself. The Court inclined to think that the plea and prescription were good, but they ordered a trial at bar to try the truth of them; when a verdict passed for the lord, and so no judgment was given upon the demurrer. Or his conduct be not incompatible with the exclusive privilege of the commoners.

4. If a person claims by prescription any manner of common in another's land, and that the owner shall be excluded from having pasture, estovers, or the like therein; this is a prescription against law, as contrary to the nature of common; it being implied in the first grant that the owner of the soil should take his reasonable profit there. See 12 H. 8; 2 Bro. Com. pl. 48; 1 Ro. Rep. 365. For altho' the lord cannot be in general entirely excluded from the profits of the waste.

5. HOSKINS V. ROBINS. H. T. 1680. K. B. 2 Saund. 320; S. C. 2 Keb. 750. 842; S. C. 2 Lev. 2; S. C. 1 Vent. 123. 163; S. C. Pollexf. 13; S. C. 1 Mod. 76. S. P. NORTH V. COY. M. T. 1678. C. P. 1 Lev. 253; S. C. 2 Keb. 577; Vaugh. 251.

Plea in bar to a cognizance for taking the plaintiff's cattle, that all customary tenants of the manor had been accustomed to have the sole and separate pasture in the *locus in quo*, &c. every year, at their will and pleasure, as belonging to their customary tenements. The defendant replied *de injuria*, and traversed the custom, which was found for the plaintiff; and, on motion in arrest of judgment, the reasons against the custom were founded on the debility of a copyholder's estate, and the unreasonableness of excluding the lord; but the Court decided in favour of the prescription, and Hale, C. J. said: notwithstanding this prescription is for sole pasture, yet the soil is the lord's and he has mines, trees, bushes, &c., and he may dig for turves. See 3 E. 3. 30; Hutt. 45; Cro. Jac. 256; Yelv. 187; 1 Buls. 93; 1 Brownl. 219. A distinction has been recognized between a prescription for common and the several pastures of a waste.

6. BENET V. MOUSE. H. T. 1675. K. B. 3 Keb. 737. [616]

Trespass. Justification in right of common from and after *primam tonsuram*, after Lammas to Lady-day, to the exclusion of every one else. Demurrer, on the ground that the plaintiff, in his capacity of lord of the manor, and having *primam tonsuram*, could not be excluded but by a prescription for sole pasture. The Court acquiesced in the propriety of the position supported by the tenor of the demurrer. See Winch. Rep. 6; 2 Rol. Abr. 267; 1 Rol. Abr. 405; 7 herbage of And it has never been doubted, but that the pasture, vestiture, and

Vin. Abr. 269; Cro. Jac. 208; Yelv. 129; Noy. 130; 2 Brownl. 60; Cro Jac. 257; 1 Bulst. 94.
 a waste
 may be en-joyed by prescription, in exclusion of the lord for a limited time. And when his right as lord is not thus fettered by an absolute or temporary right of exclusion on the part of his tenants, he may not only enjoy the usual privileges inherent in commoners by pasturing his own cattle, but may license a stranger to put in his, if sufficient common be left.

7. **SMITH V. F. VIRELL. H. T. 1673. C. P. 2 Mod. 7.**

Action on the case for disturbance of plaintiff's right of common. The defendant pleaded a licence from the lord of the soil, to put in *averia sua*. The Court were all of opinion that judgment should be given for the plaintiff, because the defendant, in his plea, had not alleged that there was sufficient common left for the commoners, for the lord could not let out to pasture so much as not to leave sufficient for the commoners.

8. **HASSARD V. CANTRELL. H. T. 1693. 1 Lutw. 38. S. P. COOPER V. MARSHALL. 1 Burr. 259; S. C. 2 Wils. 51.**

Another right be- longing to the lord is, that of hav- ing conies* as incident to his free warrant.†

In this case the Court held that the lord of the soil might put in the common beasts of warren as well as other beasts. See *Cro. Eliz. 876; Cro. 114; Godb. 122; 4 Leon. 7; 2 Leon. 201; 22 H. 6. 59; Cro. Jac. 195. 229; 1 Brownl. 208; Yelv. 104. 143; Sir W. Jones, 12; 2 Bulst. 115.*

9. **COO V. CAUTHORN. M. T. 1661. K. B. 1 Keb. 390.**

So the lord may dig mines;

Action on the case for disturbance of common. The defendant pleaded that there were ancient mines, and that he was lord; that he digged there, and did as little damage as could be: to which the plaintiff demurred specially, as amounting only to the general issue. *Per Cur.* The commoner hath right all over the common, and is therefore entitled to maintain an action against any stranger trespassing upon the soil, so that when the owner of the soil avails himself of any advantage such as the present, to which he may be, as lord of the manor, entitled, he must show in his justification the special grounds which he considers operate to render his alleged right an exception to the general rule. See 5 *Vin. Abr. 7.*

10. **KIRBY V. SARGROVE. E. T. 1797. Exch. Ch. 1 B. & P. 13; S. C. 6 T. R. 483; S. C. 3 Anst. 892.**

[617]
 Or plant trees on his common; the exercise of all these rights must however, be subser- vient to those of the com- moner;

In this case it appeared that a commoner had abated an alleged nuisance upon the common, occasioned by the erection on the part of the lord of certain trees. The Court, in deciding that the commoner had no right vested in him to abate such nuisance, even if it could be considered such, said: the right here exercised by the lord is an original right in the soil, prior to that of the common, which is only concurrent with it. But where there is a right of com- mon, the lord's right must be so exercised as not to injure the commoner. If the lord so use it as to destroy the easement, such an act would be considered as a nuisance, and abateable. If the easement be injured to a certain degree only, or if it may be a question whether injured or not, in the nature of things it cannot be a subject of abatement. The easement in question is a right of pasture over the whole soil, consistent with a free warren in the lord, and, as I think, with a right to plant. If the easement be injured, the commoner may have his action, and have satisfaction in damages.

11. **BATESON V. GREEN, et al. M. T. 1793. K. B. 5 T. R. 411.**

Unless im- memorial usage be ad- duced in e- vidence es- tablishing a contrary doctrine;

In an action of trespass for disturbing the plaintiff in his right of common, the declaration stated that he was possessed of a messuage in W., by reason whereof he ought to have common of pasture upon the common of M., for all his cattle *levant et couchant*, and that the defendant took away the turf, clay, &c. It was proved at the trial that the defendant had a right of common, and that about 25 years ago the defendant, who claimed under a lease from the lord to dig clay on the common, began to dig clay there; that the common

* The number of conies must however be reasonable; 1 *Sid. 106.*

† The king granted warren to the lord of a manor, where there was a right of common, in that division of the manor wherein the warren was, and it was adjudged that the warren could not be used, or conies put in to the prejudice of the commoner; *Sir W. Jones, 12.*

‡ So the lord may make fish ponds on his common, subject to the restrictions mentioned in the text; *Ow. 114.*

called M. consisted of about 10 acres, the herbage of about 4 acres of which was destroyed by the digging; that the other common contained about two acres; that the pits dug were very large, and were not filled up: also it was proved that the common, even if no pits have been dug, was not sufficient for the number of commoners; and that the clay had been dug by the lord for 70 years past. The plaintiff obtained a verdict; and on a motion for a new trial, the Court were of opinion that the lord's right to take this clay had been incontestably proved; for the most certain testimony showed, that he had dug these pits for a considerable time; and that although one would say that the lord has in general the superior right, because the property is in him, yet if the custom showed that it was subservient to that of the commoner, he must submit; however, in the principal case the learned judge pointed out the subserviency of the commoners right to that of the lord, and a verdict given against the lord was set aside.

12. *BOULCOTT V. WINMILL*. Summer Assize, 1809. C. P. 2 Campb. N. P. C. 261.

Action of trespass. The defendant justified for a right of common over the L. I. Q.; the plaintiff replied a custom to inclose certain parcels of the waste within the manor, with the assent of the homage, in severalty, against all persons having rights of common therein, to the exclusion and abolition of such rights. This custom was proved, and a verdict given accordingly. It was, however, insisted, that the jury were bound to find against such a custom; but the objection was found on the fact of the L. I. Q. being within a royal forest, and it was said that no inclosures ought to be permitted there. The Court however held the objection invalid, and the bar to the right of common was admitted without argument.

13. *GOE V. COTHER*. H. T. 1661. K. B. 1 Sid. 106.

This was an action upon the case by a commoner against the lord for digging pits and spreading gravel, by which he lost his common. Defendant, in his capacity as commoner of the soil, pleaded that he dug for coals, doing as little damage as possible to the pasture; and averred that he left sufficient common. Plaintiff demurred, on the ground that the plea amounted to the general issue; to which objection the Court assented; and Windham, J. said, that the action was maintainable, as the lord had no right to dig pits by which the commoner's cattle might be endangered; and observed that that was not the mode for the lord to use his estate.

2d. *To build houses on the waste.*

1. It is declared by the stat. of Westm. 2. 13. E. 1. c. 46. that by occasion of a wind-mill, sheep-cote, dairy, enlarging of a court, necessary or curtilage, none shall be grieved by assize of novel disseisin for common of pasture.*

2. *NEVILL V. HANGERTON*. E. T. 1661; K. B. 1 Lev. 62; S. C. 1 Sid. 79; S. C. 1 Keb. 283, 314.

Declaration in case of averring that he had common in three acres, and that

* From the authorities it would seem, that the species of erection which may be justified on his estate, under the above act, is not confined to the specific buildings mentioned in the text: for in H. 4. 38. an objection that a lord of a manor could not erect a house as a dwelling for a may be beast keeper was abandoned, and Lord Coke confirms the doctrine; 2 Inst. 476: he adds, seen by a that the word necessary is to be applied to curtilage, and is not to be taken according to reference to the quantity of the freehold the lord has there, but according to his personal estate, or desire, and for his necessary dwelling or abode; for if he has no freehold there in that town, but his house only, he may yet make necessary enlargement of his curtilage; and in this case he is not obliged to leave sufficient pasture; 2 Inst. 476. The sufficiency of pasture is not provided for under this clause; and it is therefore clear, that under the statute, such buildings may be erected without regard to the sufficiency of common. By 3 & 4 E. 6. c. 2. s. 5 & 6. (which confirmed the statutes of Merton and Westminster 2.) it was declared, that the act should not extend to houses heretofore built upon wastes or commons, not having above three acres of such waste or common ground belonging to them, nor to any garden, orchard, or pond there, not exceeding two acres; and that it should not cause any person to incur any loss or forfeiture for the same, but that such houses and ground should still stand and remain; howbeit, that the owners of such wastes or commons might lay open so much thereof as should exceed three acres.

[613]

Which, where the rights of the lord and commoner clash, must be always attended to as conclusive.

And the exercise of the lord's rights must not only be guided by a prudent caution, in leaving sufficient common, but by due care that it be left in its natural state, and not endangered by any act on his part, unless unavoidably necessary for the perception of those profits to which he may be entitled.

The lord of a manor has also the power of building on his estate, as H. 4. 38. an objection that a lord of a manor could not erect a house as a dwelling for a may be beast keeper was abandoned, and Lord Coke confirms the doctrine; 2 Inst. 476: he adds, seen by a that the word necessary is to be applied to curtilage, and is not to be taken according to reference to the quantity of the freehold the lord has there, but according to his personal estate, or desire, and for his necessary dwelling or abode; for if he has no freehold there in that town, but his house only, he may yet make necessary enlargement of his curtilage; and in this case he is not obliged to leave sufficient pasture; 2 Inst. 476. The sufficiency of pasture is not provided for under this clause; and it is therefore clear, that under the statute, such buildings may be erected without regard to the sufficiency of common. By 3 & 4 E. 6. c. 2. s. 5 & 6. (which confirmed the statutes of Merton and Westminster 2.) it was declared, that the act should not extend to houses heretofore built upon wastes or commons, not having above three acres of such waste or common ground belonging to them, nor to any garden, orchard, or pond there, not exceeding two acres; and that it should not cause any person to incur any loss or forfeiture for the same, but that such houses and ground should still stand and remain; howbeit, that the owners of such wastes or commons might lay open so much thereof as should exceed three acres.

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[619] the defendant had inclosed two of them. The defendant pleaded that he had a house there, and made the inclosure for the enlargement of the curtilage. But whatso ever house is erected by the lord, it must be either for his own habitation or that of his shepherd, It is custom ary for lords of manors to grant parcels of their wastes for the purpose of building such cottages; this permission is, however, seldom given without the consent of the homage. And evidence of any erections having taken place without the consent of the commoner, has been holden not sufficient to stand in competition with long enjoyed usage on their part.

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[620] So a custom for the lord to grant leases of the waste of the manor without restriction, so as to deprive the commoner of any power to depasture his cattle, is bad in point of law.

3d. To grant leases of the waste.*

1. *FOLKARD V. HENNETT AND OTHERS.* E. T. 1793. C. P. 5 T. R. 417.

In an action by a commoner against a stranger for erecting several buildings, whereby he could not enjoy his right of common in so beneficial a manner, &c.; the defence was a grant of the soil to the defendant by the lord, with the consent of the homage in fee at the will of the lord, according to the custom. *De Grey, C. J.* was of opinion, that the several licenses by different lords, the existence of which had been proved from the year 1559, were evidence for the jury to presume an original reservation of such a right at the time of the original grant, and that the vicinity of the waste to London might be a reason for such reservation. A verdict passed for the defendant. See 1 Selw. N. P. 423.

2. *DRURY V. MOORE.* M. T. 1815. K. B. 1 Stark. N. P. C. 102.

Action upon the case by a commoner against his lord for interrupting him in the enjoyment of his privilege. In evidence it was established that a building had been erected on the common for charitable purposes, which had been conveyed by deed to certain parties by the defendant, subject to the confirmation of the commoners. Proof was offered to be adduced that it had been the immemorial usage of the lords of the manor in question to limit parts of the wastes, upon which houses had been built, to the entire exclusion of those claiming a right of common. But a verdict was entered for the plaintiff; the presiding judge observing, that whatever might be the unwarrantable custom, for such it could only be called, of lords of different manors in general to bear down upon the rights and immunities of the commoners, the use in the case before him could not be supported in opposition to long enjoyment, coupled with the solemn acknowledgment of the defendant himself by deed.

3. *LADGER V. FORD.* M. T. 18 9. K. B. 3 B. & C. 153.

A right of common was claimed in this case. It appeared that for upwards of 150 years the lord had been in the habit of granting leases of parcels of the waste of the manor, under which inclosures were made; and that under similar leases the whole of the common in question was inclosed in the year 1810. There was no other waste upon the manor upon which the commoners could depasture their cattle at all times of the year, although they turned their cattle on the king's forest during all but the fence month. It was urged that the circumstance of the lord having at all times granted leases of parcel of the waste, raised an implication that such a power was reserved to him at the time of the original grant. But the court said, that it was too much to suppose a reservation of a power by the lord at the time of the original grant, the effect of which would be to enable him to annihilate the right of a common altogether: such a custom cannot exist.†

* By 13 Geo. 3. c. 81. s. 15. lords of manors are empowered, with the consent of three-fourths of the commoners, at a meeting to be holden after 14 days' notice, to lease a twelfth part of wastes for the best and most improved yearly rent that can be got at a public auction for the same, for a term not exceeding four years, and that such net rent shall be employed in draining, fencing, or otherwise improving the residue of such wastes. And by s. 16. it is provided, that where there are stinted commons, instead of leasing them, an assessment or assessment may be levied upon the lords and the commoners, to be agreed upon at a meeting after 14 days' notice; and by the major part in number and value of the commoners; and that the proceeds of such assessment shall be laid out under the direction of the lords, for the improvement of the wastes: power is then given by virtue of a warrant, under the hand of one justice, to distrain the goods of any person refusing to pay the assessment, having been demanded 10 days previously.

† Although the lord of a manor may grant parcels of his waste to strangers by custom, yet there does not appear to be any reason which would prevent him from so doing without a custom, for the soil is his freehold, and the legal presumption of a reserved grant is in his

4. TYSSEN V. CLARKE. E. T. 1774. C. P. 3 Wils. 541.

Per De Grey, C. J. The lord of a manor only may enclose as much of the waste or common within his manor as he pleases, leaving sufficient for the tenants; but the grantee of a lord cannot enclose any part of the waste or common without the consent of the tenants of the manor as well as the lord. the waste without the consent of the tenants of the manor as well as of the lord.

And it has been hold en that the grantee of a lord can not inclose any part of

3d. To approve.* 1. In general.

1. GRANT V. GUNNER. H. T. 1803. C. P. 1 Taunt. 447.

Per Lawrence, J. At common law the lord might perhaps inclose against common appendant, which was not an express grant, but was exercised where the lord granted arable land to be held of himself; but it does not follow that he could approve against his own grant.†

It would seem that the lord had the power to approve at common law.

2. In the statute of Merton, 20 H. 3. c. 4. it was enacted, that when any of the tenants of a manor brought an issue of novel disseisin for their common of pasture, and it was therein recognised by the justices that they had as much pasture as sufficed to their tenements together with free egress and regress from their tenements unto the pasture, they should be contented therewith; and they of whom it was complained should get quit of as much as they had made their lands, wastes, woods and pastures. If they alleged that they had not sufficient pasture, or sufficient ingress and egress, according to their hold, the truth thereof is to be inquired into by the assize, if it was found as alleged, they were to recover their reisin by view of the inquest, and the disseisors were to be amerced as in other cases

[621] But it be ing found highly in convenient that any doubts should exist, the legisla ture inter fered, first by inserting a clause in the statute upon the subject,

favour, and with respect to the homage jury, they meet not to restrain his privileges, but to deliberate for his benefit; see 2 T. R. 392. note.

* In reference to the lord's power of approving or inclosing a part of the waste, leaving sufficient common with egress and regress for the commoner; this power, since the introduction of inclosure acts, is rarely brought into action. By these acts the lords and commoners are mutually benefitted, whereas an approvement was often the forerunner of protracted animosities between the lord and his neighbours, and must always have been viewed by the latter as an infringement on their ancient rights. Prior, however, to the passing of these acts, the system of approvement was found to be of great public benefit: it contributed to the advancement of tillage and agriculture: it enabled lords of manors to modify, with advantage to themselves and others, the profuse liberality of the original grants; and it is in effect to the prosperity of this system that this country is indebted for the enactments of the inclosure acts, and the beneficial operation that has accrued from them; and to such a degree has this been experienced, that the various local acts passed for the purpose of enolosing particular wastes became at length of such frequent occurrence, that the legislature determined, for the purpose of reducing the expence of carrying them through parliament, to consolidate the principal clauses which it had been necessary to insert in the respective local acts into one statute. The various provisions which are given effect to, the actions brought to enforce such provisions, the evidence to be given, and other incidental matters, and the relief which the Court of Chancery invariably afforded in protecting lords of manors and others intered in the inclosure of waste grounds, will not be examined under the title of this work now under consideration; they will be found under the title "Inclosures." Reference may be made in the mean time to the statutes 22 E. 4: 35 H. 8. c. 17; 12 Eliz. c. 25; 12 Ann. c. 4; 29 G. 2. c. 36; and 31 G. 2. c. 41; which acts were made for the preservation of woods, and were in some cases imperative on lords of manors and owners of waste, to inclose places where woods had been lately felled, and to suspend the rights of the commoner for a specified period. Then came the 13 Geo. 3. c. 81. which was passed in the session of 1773, when Great Britain had suffered considerably from want of sufficient corn to maintain her population, for the better cultivation, improvement, and regulation of common, arable fields, wastes, and pastures. And lastly, as has been shown above, the legislature saw the utility to be derived from encouraging the system which had been worked upon by individuals in various local districts, and with that intention directed the drawing up of the 41 G. 3. c. 109. usually called the General Inclosure Act, which has been virtually amended by the 1 & 2 G. 4. c. 23.

† From which it has been said, that the doctrine of Lord Coke, in his institute (2 Inst. 85), may be reconciled, where he says he is of opinion that such a right existed in the lord at common law; but gives as a reason for a contrary doctrine, that as the common is sued out of the whole waste and every part thereof, approvement could not be made; see also 1 Rol. Rep. 365. But whatever may be the received opinion, either for or against the right to approve at common law, as it may have existed prior to the passing statutory enactments on the subject, it is presumed that some reasons might be brought forward militating against such a position; for, in the first place, it is difficult to contend, as it has been said, that those acts were made in affirmance of the common law, when the statute of

[622] By stat. West. 1. 13. E. 1. c. 46. which recited, that because in the statute of Merton no mention was made of approvements between neighbour and neighbour, and that by reason of a doubt whether that statute applied only to lord and tenant, many lords of wastes, woods, and pastures, had been hindered from making approvements by the contradiction of neighbours, though they had sufficient pasture; the stat. of Merton was declared to extend, not only to the lord's tenants, but also to neighbours, and although a neighbour properly is one *qui una in eodem rivo est*, yet, according to Lord Coke, the word *vicinus*, in this act, is taken for a neighbour, though he dwell in another town, so as the town and the common adjoin; 2 Inst. 474. Both these statutes were confirmed by 3 & 4 E. 6. c. 3.

2. *As to what may be approved.*

Among the subjects of approve-ment may be ranked common of vicinage.†

1. HARDING V. BROOKS. E T. 1672. K. B. 3 Keb. 24. S. P. DEANE V. CLAYTON. E. T. 1817. C. P. 1 Moore. 214; S. C. 7 Taunt. 489; S. C. 2 Marsh. 577.

Trespass by the plaintiff as commoner of A. B. in N. for common. The defendant justified under C. D., to inclose, as lord of the soil, alleging this to be only common of vicinage, which it was agreed might be inclosed. The plaintiff was accordingly nonsuited. See 4 Rep. 38; Co. Litt. 122; a; Bro. Ass. 46.

But it would seem that common in gross can not be viewed as approve-able;

2. REX AND MAYNARD V. THE INHABITANTS OF ST. BRIVILLS. H. T. 1664. K. B. 1 Keb. 830. S. P. WEEKLY V. WILDMAN. M. T. 1698. K. B. 1 Lord Raym. 407.

Per Kelyng, C. J. A common in gross seems not to be within the statutes relating to approve-ment, for the words which allow approvements refer to those portions of wastes which are attached to tenements. See Bract. 228; 2 Inst. 86; 34 Ass. pl. 11; Bro. Com. pl. 26; Cro. Jac. 271; Yelv. 201; 1 Brownl. 220.

Even altho' for a cer-tain num-ber;

3. REX AND MAYNARD V. THE INHABITANTS OF ST. BRIVILLS. H. T. 1664. K. B. 1 Keb. 830

Per Wyndham, J. The lord of a manor cannot approve against his own grant, though it were for a certain number. See vide, 5 Vin. Abr. 7.

4. GRANT V. GUNNER. H. T. 1809. C. P. 1 Taunt. 435.

[623] Nor com-mon of tur-bary;

The question arising from what appeared on the pleadings before the Court was, whether common of turbary was approve-able. It was agreed that it could not be so considered; common of pasture being the only species of common that was alluded to in the statutes of approve-ment; and as there existed no right at common law, and as these statutes was made in affirmance of the common law, it must be inferred that no right existed; that the statutes together declared all the rights which the lord had; and especially as it being found that the first statute had not sufficiently declared this, the second was made 50 years afterwards to supply the deficiency; and the legislature even then preserved a taciturnity as to any right of common save that of pasture. It was also urged that an objection against the reasonableness of the approve-ment contended for, was to be found in the nature of these respective common rights; Westminster recites, that lords were hindred from approving against neighbours, for inas-much as in the former statute no mention was made of that case; and in the next place it is worthy of observation, that the decisions of the courts of law have recognized no right to approve, except in cases of common of pasture, which is the only right mentioned in the acts, and which therefore of itself affords a clear inference that no such right could have been ever given effect to, even in the case of pasture lands, had the legislature not inter-fere-d.

* Sufficient pasture must be, however, left for the commoners; see 20 H. 3. c. 4; 1 Inst. 88. But it seems that if sufficient common be left at the time of the approve-ment, the statute will be satisfied, though there be not enough afterwards; 8 Ass. pl. 18; Bro. Com. pl. 21. A sufficient facility to enjoy egress and regress must, however, under all circum-stances, be afforded to the commoners; 11 H. 4. 26; F. N. B. 125; and where a lord had common in three vills, it was resolved, that he might approve in the one vill, leaving suffi-cient in the other two; Bro. Com. pl. 52. cites 3 E. 3.

† And common appendant and appurtenant, whether certain or uncertain; 2 Inst. 86; and common appurtenant *sans nombre*; 4 Leon. 41.

that common of pasture was of a thing annually recurring; that the number of acres which would afford in one year sufficient pasture for the tenants' cattle, *levant et couchant* in a particular teneiment would, *communibus annis*, afford sufficient for the same quantity of cattle in all subsequent times, so that if a sufficiency of pasture were left at the time of the approvement the fertility of the tenements remaining the same it would always be a sufficiency; that on the other hand turbary was an annihilation of the subject matter; for if peat renewed, which certainly did not take place in all instances, and it was doubtful whether it did in any, it renewed too slowly to repair the necessary consumption. The counsel on the other side contended, that as no authority had been cited, showing that there was no approver at common law, and as although it was true that the right of approving could not be exercised by virtue of the statute of Charles, in any case but in that of pasture, it did not at all follow that there was no approver in any other cases or before that statute. The right claimed in the case before the Court might be supported. But the Court said: the universally received opinion has for many years been, that there can be no approver against the common of turbary, and we see no reason to shake such position at the present day. On the contrary the position seems borne out, not only by the construction and implication to be put upon, and derived from, the enactments of the legislature, but by reason and principle. The argument that pasture is a thing annually renewing, and that the turbary is not, is a very strong and forcible one, and might of itself warrant us in pronouncing our judgment against the privilege claimed.

5. DUBERLEY V. PAGE. ET AL. E. T. 1738. 2 T. R. 391.

To an action of trespass for entering waste in a manor: 1st. Plea not guilty; 2d. Justification. 1st. Under a right of common. Replication a right of approving, after leaving a sufficiency of common; and 2d. Under a right of digging sand or gravel upon the waste; which was traversed by the replication. The defendants also pleaded a custom, that if any person had been desirous to approve waste, obtaining the consent and licence of the lord, he might be presented by the homage of the Court baron at a general Court, and if the homage thought it no prejudice to any of the tenants, &c. it had been the custom that a fine should be set on such person by the homage who might then inclose. The plea concluded by alleging that the homage had not presented any such person, &c. Replication, that the lord had a right to inclose under the statute of Merton, and did approve the same, leaving common sufficient for all persons. Demurrer thereto, and joinder.

Per Cur. The right of the lord of the manor in this case is a common law right, and not dependant upon any custom. Every custom must be construed according to the subject matter of it. Here it is only applicable to the tenants of the manor; it gives them a right of inclosing under certain restrictions, which they would not otherwise have been entitled to do at all. But the right here exercised by the lord is superior to the custom, and derived from the common law. Now the words are, "any person being desirous of inclosing may apply to the Court, &c. first obtaining the consent of the lord." Therefore in no instance can the tenant inclose without such consent. Judgment for the plaintiff.

6. SHAKESPEAR V. PEPPIN. T. T. 1796. K. B. 6 T. R. 741. S. P. FAWCETT V. STRICKLAND. T. T. 1737. C. P. 2 Com. 578; S. C. Willes. 57.

In an action of replevin for cattle, avowry that the place where, &c. was formerly part of a certain common, but lately separated from the rest, and is vested in defendant, and because the plaintiff's cattle were doing damage there, in the same he distrained them. Plea in bar, that the *locus in quo* has been immemorially waste, one part of the common, and that the plaintiff having a right of common of pasture put his cattle on the said common to depasture, and the defendant wrongfully took them, &c. Replication, that the lords of the manor by lease and release

But if there are two distinct rights in the same waste, one of which may be approved against the other not.

* It was made a question, whether a salt marsh in common to two vills, held by the other tenants of those vills respectively by prescription, for their sheep, could be approved; 2 the approver.

er may take place if no injury be done to the other right.

conveyed the *locus in quo* to the defendant in fee, in order that he might inclose and approve the same, &c. leaving in the residue of the common sufficient common of pasture for all the commonable cattle. Rejoinder that there is a custom within the manor for the tenants to have the privilege of digging for and carrying away sand, loam, and gravel from the common; that because the *locus in quo* was so inclosed, the plaintiff could not enjoy his right in so ample and beneficial a manner, therefore he pulled down the fences. Sur-rejoinder, that at the time of the inclosure and approvement, there was left in the residue of the common sufficient sand, &c. To this there was a general demurrer. On the argument, the question was, whether, when the tenants of a manor have a right to dig for sand, loam, and gravel, on a common within the manor, and whether the lord can inclose and approve under the statute of Merton; 20 Hen. 3. c. 4.

[625]

Per Cur. Our judgment in this case will be governed by the decision of C. J. Willes, (shortly reported in *Fawcett v. Strickland*, Com. Rep. 577, which the Court read for the Chief Justice,) and is in substance as follows: That though a lord cannot by virtue of the statute of Merton, 20 Hen. 3. c. 4. inclose and approve against a common of pasture; and common of turbary in the same waste, the common of turbary will not hinder the lord from inclosing against the common of pasture, for they are two distinct rights. And wherever rights are in their nature distinct, as common of pasture and common of turbary certainly are, we think it will be just the same; though they happen to concur in one and the same person, as they do in the present case. As therefore his only complaint is of an interruption of his common of pasture, and as by the statute of Merton the defendant Strickland might certainly inclose part of the common, notwithstanding the plaintiff's right of common or pasture, if he has left sufficient common of pasture, which in the present case is admitted by the pleadings, we are of opinion that the defendant must have judgment.—Judgment for the defendant.

3 *As to the parties who are entitled to approve.**

GLOVER v. LANE. M. T. 1789. K. B. 3 Ter. Rep. 445.

The feeoffee of a waste may approve, provided he leaves a sufficiency of common

To an action of trespass for entering a house, the defendant pleaded that he and all his predecessors have immemorially had common of pasture on the manor of P. for their commonable cattle; and the defendant, because the house was wrongfully and injuriously erected upon that part of the waste, &c. in the manor of P. and enclosed a great part of it, so that he was thereby prevented from enjoying his right of common; justified breaking, &c. Replication, that one J. G. was seised of the said part of the waste or common of pasture, &c. lying within the manor of P., and approved the same, leaving sufficient common of pasture, &c., and that G. demised to the plaintiff, by virtue of which he entered, and the defendant of his own wrong entered, &c. After a verdict for the plaintiff, a motion was made to arrest the judgment, on the ground that none but the lord of the manor could approve. *Per Cur.* From the counsel's argument it would seem as if a rule prevailed that in order to entitle a party to approve he must be the lord of the manor. Now if such a rule prevailed, half of the wastes in the kingdom could not have been approved; for many of the places that are called manors would not be found to be such in point of law if the matter were strictly examined. To constitute a manor it is necessary not only that there should be two freeholders within the manor, but two freeholders holding of the manor subject to escheats. The only doubt, if there be any doubt at all, is whether those statutes 20 Hen. 3. c. 4. and 13 Edw. 6. c. 46. extend to wastes that are not wastes of a manor; but it is not necessary to decide that question here, for the replication states that this is a large waste within a manor. Now it appears to have been decided, that if the part be severed from the manor, it does not prevent its being

* Although inclosures of this nature are usually effected by lords of manors, Lord Coke in his 2 Inst. p. 474. says, if the lord have common in the tenant's ground, the tenant may improve within the statute of West. for he is in this case *vicinus*: see 18 Ass. pl. 4; 18 E. 3. 48; Bro. Com. pl. 22

approved. If the lord grant over the waste, the alienee may approve. That [626] is the present case. It is not necessary to go further for the determination of this question; but if it were, we should have no difficulty in saying that at common law the lord might have approved, as much in cases of common by grant as of common appendant.—Rule discharged.

2. CLARKSON v WOODHOUSE. M. T. 1784 K. B. 5 T. R. 412. n.

Trespass for breaking and entering the plaintiff's close. Justification (*inter alia*) in right of an ancient message, to take turbary for fuel and for common of pasture. Replication, that there are divers ancient messuages as well as defendant's which, from time whereof, &c., have had common of turbary, in and upon the said close except such parts thereof as have been inclosed and approved in manner hereinafter mentioned, after such approvement and inclosure of such parts respectively), to dig and take turves, &c. (except as aforesaid, &c.) and so with reference to this common of pasture; that within the manor in which the waste lies there hath been a custom that the owners of the said waste or common from time whereof, &c., have set out and assigned to the several owners of such ancient messuages, upon their reasonable request in that behalf, certain reasonable parts and proportions of the said waste or common, to be by them respectively held in severalty for digging and getting turves therein for their necessary fuel, and that the respective owners of such ancient messuages have dug and got for all the time whereof, &c. and of right ought, &c. such turves in such their respective moss-ales, so to them assigned and set forth as aforesaid; and in no other parts of the said waste, so long as any turbary hath remained or shall remain in such respective moss-ales and when and so often as the turbary of such moss-ales hath been or shall be got or cleared therefrom by such digging, the owners of the said waste for the time being, for all the time whereof, &c. have inclosed and approved, &c. to themselves all such moss-ales, and to hold the same so inclosed at their pleasure in severalty, for ever afterwards freed and discharged from all common of turbary and pasture thereon. It then stated that A. and others were seised of the moss; and being so seised, inclosed and approved the closes, being moss-ales, cleared as aforesaid, and demised to the plaintiff. The rejoinder traversed the custom, and issue was taken thereon. A verdict was found for the plaintiff. A motion was made in arrest of judgment; when, *inter alia*, it was urged that the custom was unreasonable, because in destruction of the right claimed, and repugnant to it. But the Court said: there is no foundation for this objection, when it is understood what the repugnancy is that destroys a custom, namely, such a one as shows that it did never exist. It is a contradiction in terms, being that which prevents a man from taking any benefit of his right. As if a man say, I can shut it up when I will; that is saying, you have no right. But this is a qualification of the right; suppose it introduced at the same time with the grant, the grantor might qualify it in any way. It is not an unreasonable matter of agreement or grant; therefore there is nothing unreasonable or repugnant in this. As to the point of unreasonableness, the law controls any arbitrary conduct of the lord; here it is fuel to be used in the message. The grant is advantageous both to the lord and tenant. The vicinity of, and exclusive right in, an allotment, are great advantages. It is far better for the tenant to have a piece of moss near his house in severalty, than to have to go all over the common for it.

4. *As to the mode of approving.*

When any person entitled to approve avails himself of his right, he must take care to separate the part inclosed from the remainder of the waste by some visible boundary, so as to prevent the commoner's cattle from straying into the approved ground. Gaps will not, however, prevent land thus severed from being considered an inclosure; see 2 Inst. 87; Litt. Rep. 267; and Woolrych on Rights of Common, 182.

5thly. *To summon a jury to inquire of misfeasances done to the waste.*

* And it has been decided, that a lord, who is in by wrong, may, by virtue of the stat. of Merton, approve against the tenants and commoners; Clayt 38.

So a custom authorising the owners of ancient messuages, after clearing certain moss-ales of turves, to approve and hold them severally was sustained.*

[627]

With the view of insuring to the lords of manors the privilege of superintending the prosperity of the wastes over which they are the superiors, they have a right by custom of summoning a jury to inquire of misfeazance, and to pass such bye-laws, and make such salutary regulations, as they shall think fit, for the preservation of the rights of common, see *Cro. Car.* 497, 498; and see *Woolrych on Rights of Common*, p. 189.

(B. AS TO THE PRIVILEGES AND DISABILITIES OF COMMONERS.

1st. *Considered with reference to their power to enjoy the common.**

1. *ANON.* H. T. 1760. K. B. 12 Mod. 648.

The commoner has a special limited interest in the soil, which he may enforce by any means in his power.

[628] He must not, however, meddle with the soil,

Unless he be so authorised by special prescription.†

In this case it appeared that there was a right of common after the corn was taken away; and the Court held that the owner of the soil should not be allowed to sow peas, and thereby suspend the benefit that would accrue to the individual. See 2 Leon. 202; *Cro. Jac.* 271; *Yelv.* 23. 185; 1 Brownl. 188, 220.

2. *HOWARD V. SPENCER.* E. T. 1664. K. B. 1 Sid. 251.

In this case the court held that a commoner had no power to cut mole-hills or bushes on the common, or make fish-ponds, although they might even be acts of improvement. See 12 H. 8. 2; 13 H. 8. 15; *Bro. Com. pl.* 48; *Godb.* 182; 2 Bulst. 116; 1 Brownl. 228.

3. *BEAU V. BOON.* M. T. 1773. C. P. 3 Wils. 456.

The question which arose in this case was, that whether a custom that whoever occupied land in the parish of L. and had a right of common in the waste there, might cut and take rushes there, was valid? The Court were of opinion that it was.

2dly. *Considered with reference to their power to confer a temporary or absolute right of common on others.*

The right of common may be let; so in some cases let;

1. "In some manors it is very usual for commoners to let their rights, and as for a time to convert them into commons in gross: but it has been seen, that common appurtenant is alone capable of being so changed; and, further, that even that right cannot be the subject of alteration unless it be for a certain number of beasts; (5 Taunt. 244; and in that case the letting is considered rather to be of pasture than of common; *Cro. Jac.* 575. The same rule applies to commons of estovers and turbary; but where a definite quantity of stover or of turf (so many cart loads for instance) is allowed to be taken throughout the year, it is competent for the grantee of such a privilege to let it, for no injury can be thereby sustained by other persons; and, although there is not any decided case upon the subject, it may be suggested that an uncertain common of piscary cannot be made the subject of a letting, for the original intention of such a liberty was the sustenance of the tenant and his family;

* The interest which a commoner has in the common, is, in the legal phrase, to eat the grass with the mouths of his cattle. He must not meddle at all with the soil, nor with its fruit and produce, even though it may eventually improve and meliorate the common; 1 Rol. Abr. 406. pl. 10; 12 H. 8. 2. a; 6 Vin. Abr. 34. It has been accordingly resolved, that he cannot justify in an action of trespass, the coming to put his cattle into the waste, unless he actually has put them in; 5 Vin. Abr. 34. But it was at the same time agreed, that he might come to see if the pasture were in a fit state to receive his cattle; *ibid.*

† By 13 Geo. 3. c. 81. s. 11. it was enacted, that it might be lawful for any persons having lands in any open or common fields adjoining to balks, blades, or meers, being waste, with the consent of the lord or lords of the respective manors wherein such balks &c. do lie, and likewise of the person or persons who may have a separate sheep walk in the said fields, and with the consent of three fourths in number and value of the occupiers of such common fields, to be signified at any meeting to be held in manner aforesaid, to plough up any of the said balks, &c. and convert the same into tillage. Sect. 12. provides, that if any balk, &c. be a public or private road, it shall not be so ploughed up. By sect. 13. after licence so obtained, and before the ploughing commences, the party is under the direction of the field-reeve to lay down in a husband like manner as much of his own land as shall be equal in value to the land he has licence to plough, and such land shall be deemed common land. The various other rights more or less connected with the privileges of commoners, such as their power to agist the beasts of a stranger, have been already alluded to under the particular species of common to which they are applicable, and which have been examined in a former part of this title. It would be, therefore, superfluous to advert to them again in this place, further than by merely referring the reader to the part of the work in which they are contained; *vide ante*, p. 611. &c.

should the tenant then allow another person to partake of that profit, other commoners might complain that the lessee, having a larger family than their fellow commoner, is in the habit of using more fish than he; and the lord would besides, by these means be injured. However there does not seem to be any reason why a licence to take a certain quantity of fish, as so many brace of trout, should not be granted over; and it seems that the commoner may also license another to take so many loads of sand, gravel, &c.;" see Woolrych on Rights of Common, 193. [629]

2. WEEKLY V. WILDMAN. H. T. 1697. K. B. 1 Lord Raym. 407.

Per Treby, J. Although a common *sans nombre* may be granted over when enjoyed in a fee, yet it cannot be alienated by grantees in tail for life or for years.* See 22 E. 4. 6; 5 H. 7. 7. Or aliened.

3. As a general rule, all persons not labouring under natural or acquired disabilities, may alien any right of common they may possess; but a body corporate cannot effect such a change.† See 22 Flet. 314; Co. Litt. 165. a.; 1 Keb. 795. And this power is vested in all individuals who possess the right.

4. SPEAKER V. STYANT. T. T. 1688. K. B. Comb. 127.

A copyholder, having common by custom purchased the freehold of his tenement, with all commons thereto belonging, under the words, "grant, bargain and sell." The Court held, first, that this common being extinguished, could not be revived without a special grant; and, secondly, that it could not pass by bargain and sale, for that could only be by way of use, which could not be said of a thing created *de novo*. See Rol. Ab. 63; Yelv. 201; S. C. Cro. Jac. 271; S. C. 1 Brownl. 220; 2 Sid. 87; Palm 388; Cro. Jac. 574. 673; 2 Mod. 277; 3 Mod. 521; 1 Bing. 217; 1 Rol. Ab. 102; 12 H. 7. 25; Cro. Car. 482. The usual mode of aliening commons is by deed; as by grant bargain and sale. §

5. HUSKINS V. ROBINS. E. T. 1670. 2 Saund. 328; S. C. 1 Vent. 123; S. C. 2 Lev. 2; S. C. 1 Mod. 74; S. C. 2 Keb. 753 812. [630]

The plaintiff pleaded in bar to a cognizance, leave and license from a copyholder to put his cattle on a common, not saying that the licence was by deed. The Court seemed to be of opinion that such a plea was bad; but they clearly held, that as the issue was joined on the custom, the fault was cured by the verdict, and they said they would presume a good licence. So a right of common may be transferred by license or by deed.

6. GWYDER V. FOAKES. E. T. 1798; K. B. 7. T. R. 641.

In deciding this case, the point in which was, (*vide infra*,) whether by a grant of all tithes arising out of, or in respect of farms, lands, &c. the tithes arising out of and in respect of rights of common appurtenant to such farm or lands, would pass, and in which the Court held that they would; it was considered, that if land be granted, to which there is a common appendant or appurtenant, such common would undoubtedly pass with the land. In the construction of the words in a deed, by which common will pass, it may be stated, as a general principle, that things appendant to land will go over with such land.

* A different rule would prevail where the right is in gross for a fixed number of beasts. Estovers, which are to be spent on a chimney, cannot be granted over, for they are attached to the place which gives the right to take them; (22 E. 4. 6; 5 H. 7. 7); but it seems there may be a grant of them generally.

† It may be remarked here, that a parcener, or joint tenant, cannot devise by reason of the accruing survivorship, and that when either alien this right respectively to the other, the transmission must be by release, since both are seized of the same estate, and neither can enfeoff the other; (2 Cru. Dig. 504; Fet. 314; 1 Keb. 795.)

‡ Yet where a parol lease for less than three years is made of land to which a common is appendant or appurtenant, such common will certainly pass according to the rule which prescribes that whatever is incident to land, will pass by the description of land; 2 Ro. Ab. 60.

§ Lease and release, or by devise; see Brit. 144. A right of common may likewise be alienated by fine, and it will pass with lands of which a recovery has been suffered. But these methods are only applicable to appendant and appurtenant commons, and it is not necessary to mention the right specially, because it would go over with the soil to which it is annexed; see 19 E. 4. 9; 21 E. 4. 62; 2 Ro. Abr. 19. Again, rights of this nature may be exchanged for land; Perk. s. 263; and the commoner may release his estovers in other property in the waste to the terre-tenant in exchange for other land: Co. Litt. 506; yet the common will be thereby extinguished. There is no doubt but that a right of this kind may be assigned by commissioners of bankrupts when in gross; see Stone, 123. cited in Goodwyn's Law of Bankrupts, p. 116; and Woolrych on Rights of Common, p. 138.

So by a grant of all demesnes, the waste itself will pass.

So incidents to commons, tithes for instance, have been holden to pass with the common under the words messuages or tenements, farms, lands, and hereditaments.*

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7 NORTH V. HOWLAND M. T. 1668. K. B. 2 Keb 577.

Trespass: plea, that defendant had an ancient tenement in the said place; excluding the lord. Replication, traversing the allegations of the plea. The evidence adduced supported the replication, and a verdict was accordingly found for the plaintiff: and the Court in pronouncing judgment, said, by the grant of all the demesnes, the waste passeth, unless excepted. See Co. Litt. 121. b; Perk. 51.

8. GWYDIE V. FOAKES. E. T. 1798. K. B. 7 T. R. 641.

In this case it appeared, that there was in the parish of A. a large quantity of waste ground, on which the tenants of the adjoining inclosures had right of common. Before any inclosure was in contemplation, those tenants purchased the right to all the tithes of the lay impropricator, in respect of their several estates; and the conveyances were made in very general terms, "of all and all manner of tithes, &c. belonging to, or parcel of the rectory impropriate of A. coming, arising, &c. out of, and upon, for, or in respect of the several messuages or tenements, farms, lands, &c." with some immaterial variation in the wording of the deeds. It was now contended, that the lay impropricator intended to reserve the tithes in respect of the rights of common appurtenant to those estates.

Sed Per Cur. If the question had been put to him recently after the grants and before the inclosure was in contemplation, it cannot be conceived that he would have advanced such a claim, or that it could have been in contemplation of the contracting parties at the time: it is evidently an after thought. It must be admitted, that none of the conveyances do in terms apply to the tithe of the common land, but we cannot infer them thence that they were, therefore, intended to be excluded. The truth is, that it was an object of too little importance to be worth attending to at that time. It is impossible, however, to distinguish this from the case of *Stockwell v. Terry*, 1 Ves. 118. There an act of parliament had been passed for an inclosure of common, founded upon an agreement of the parties that the tenants of the inclosures should enjoy all their rights in severally as they did their rights of common before a certain portion of the common was allotted to the defendant in lieu of his right of common: The question was, whether this was to be covered by a modus which was paid for it before, when in common. And in that case, though the common, when inclosed, yielded several species of tithes, which it did not do before, yet *Lord Hardwick* held, that it was covered by the same modus. And he said, that though the recital in the act of parliament, to which all the parties interested had agreed, used only general words, yet the intention plainly was, that every person should enjoy his allotment in the same manner as he did the thing in lieu; and that having been subject to the modus, the allotment should be so still. Then the case of *Moncaster v. Watson*, 3 Burr. 1375, so far from contravening that doctrine, as is supposed, affects to follow and adopt it. The case indeed, there, was different, because the modus was confined to the demesne lands, and did not extend, or affect to extend, to the common. Upon the whole, we are satisfied that there was no intention in the parties to these several conveyances to exclude the tithes of the common, and I think that the general words of grant used are sufficient to carry them.

9. SOLME V. BULLOCK. E. T. 1683. C. P. 3 Lev. 165; 1 Sid. 354; 2 Keb. 290. 312.

It is usual, however, in deeds which pass commons to state the grant as being of lands that although it was customary to set out in deeds which were executed with all

Trespass for digging turves. Justification by defendant, showing that a grant of the former lord of the manor had been made to I J., to enable him to enjoy the privilege of turbary; and that the house in which such fuel was to be consumed had been granted *cum pertinentiis*, to the defendant and his heirs. The question which was agitated was, whether the turbary passed by the words *cum pertinentiis*, without being specially named. The Court observed, that although it was customary to set out in deeds which were executed with

* An apportionable common in gross will go over in like manner: Cro. Car. 482; 2 Ro. Ab. 60. S. C. But a common in gross will not be transferred by the mention of lands, tenements, and pastures; for it has no relation to lands; 20 Am. pl. 9; 2 Ro. Ab. 57.

the intention of alienating common, the grant as being of lands with all commons thereunto belonging, still common appurtenant clearly passed by the word "appurtenances." See *Plowd.* 381; 5 *Co.* 17; *Cro. Jac.* 189. 253; 1 *Brownl.* 220; *Yelv.* 189; *Noy* 136; 1 *Bulst.* 12; *Comb.* 127; *Cro. Car.* 482; 1 *Taunt.* 205; *Cro. Eliz.* 70. 794; 2 *And.* 168; 4 *Mod.* 365; 2. *Brownl.* 52; 1 *Bulst.* 18; *Sir W. Jon.* 349.

V. RELATIVE TO THE REMEDIES TO PROTECT THE RIGHTS APPERTAINING TO THE WASTE, AND PRIVILEGES INCIDENT THERETO.

(A) ON THE PART OF THE LORD.†

1st. *By actions.*‡

1. *Of the form of action.*

(a 1) *As to the Action of ejectment.*

CREACH v. WILMOT. *Derby Summer Assizes.* 1752. 2 *Taunt.* 160. n. S. P.

HAWKE v. BACON. *M. T.* 1809. *C. P.* 2 *Taunt.* 156.

Trespass for breaking closes, &c.; justification by a commoner, as being part of a common, &c. Evidence that some of the closes had been inclosed above 400 years, and that the plaintiff had a little house built on one of them, and it was insisted by the plaintiff that this no longer remained a part of the common, that the possession had fixed a freehold in the cottager, and that the commoners were bound by the statute of limitations. Answered, that a right of common cannot be barred by the statute of limitations, that the question was on the mere right; and therefore, though the statute of limitations would have been a bar in ejectment, or formedon where the land was in question; yet in this action where the right is in question, the statute is no bar. *Per Lee, C. J.* A possession of above 40 years has been proved, and there is no difference between the lord of a manor and a commoner. The lord could not have brought an ejectment, may be maintained by the lord of a manor for a disseisin, but he is barred by an adverse possession of 20 years, and must under such circumstances have recourse to a writ of right.

* In consequence of the right which, it has been pointed out above, is vested in commoners, questions have frequently arisen as to the apportionment of such rights where a partial change has merely taken place in the possession of the property in respect of which the common was originally claimable. All common appendant may be apportioned under such circumstances, because, they are of common right; as when the commoner either purchases part of the waste, or aliens part of the land in respect of which the common is claimed; *Co. Litt.* 122. a; 1 *Brownl.* 80; 2d *id.* 297; 13 *Rep.* 66; 8 *Rep.* 78; *Hob.* 25; *Gouldsb.* 38; *Ow.* 4; *Hob.* 235; *Noy.* 30. So commons appurtenant may be apportioned, where part of the land is aliened, to which the common is appurtenant; *Hob.* 235; 8 *Rep.* 79; 4 *id.* 38. a. But where any parcel of land having an appendant common becomes united with the land which confers the right, the privilege is immediately extinguished, because it is against common right; 4 *Rep.* 37; 1 *And.* 159; 1 *Leon.* 43; *Gouldsb.* 53; *Winch. Rep.* 45; *Hutt.* 58; *Cro. Eliz.* 594; 2 *Brownl.* 298. The same restriction seems applicable to a common in gross; *Ow.* 122; 5 *Vin. Abr.* 12. A distinction, it would appear, may be however drawn where part of the waste, and the land to which it belongs, becomes united by descent, and not by alienation, so as the waste be not surcharged; *Co. Litt.* 148. a. 149. But where a right of common in gross was for a fixed number of cattle, Lord Coke was of opinion that in such a case it should be apportioned; *Co. Litt.* 149. And he expresses himself in a similar way respecting estovers, turbary, and piscary; *ibid.*; see also *Flet.* 814; *Co. Kitt.* 115. n. It has been determined that where common is enjoyed for a certain number of cattle, and so small a portion of land to which it appertains be devised as will not keep an ox, or a sheep, the right shall remain in the lessor, yet so as he shall not surcharge the land; 13 *Rep.* 66. It may be as well to state that in apportioning the land, the quality and quantity of the land in respect of which the allotment is made must be attended to; see *Gouldsb.* 117; 37 *H.* 6. 34; and see *Woolrych*, 139.

† The lord is also protected by the Court of Chancery in his appurement, and the same court will compel an equitable fulfilment of contracts between him and his tenants; see *Woolrych on Right of Common*, p. 391.

‡ As to the remedies which may be resorted to at the leet, a distinction must be observed between public nuisances and injuries affecting private property. In the former instance only can offenders be punished at the leet; see *Cro. Eliz.* 448; *Sir T. Rd.* 160, 2 *Keb.* 367. 526; *Cro. Car.* 497.

§ The assize of novel disseisin used to be the most usual remedy prior to the adoption of a more modern form of procedure. The writ declared that B. had unjustly dispossessed A. of his common appendant, &c. (or if in gross of his common generally), and commanded the sheriff to restore the teneement to A. till the first assize for the county, &c.

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So in cases of disturbance, the action of trespass.

jectment after 20 years' possession. Here the commoner, if he had any right, should have brought an assize of common, and not made an entry. The jury were directed to find for the plaintiff.

(b 1) *As to the action of trespass.**

This form of action may be resorted to where the lord is disturbed in the enjoyment of his soil either by strangers, or by his tenants.

* In the case of a disturbance of a lord's waste, the writ of *quo jure*, which is now out of use, was resorted to by the lord or terre-tenant. It commanded the sheriff to summon the defendant to show by what right he claimed common in the plaintiff's lands. The tenant then made his defence, and set out his title, showing his seisin, and the esplees on which the defendant denied the seisin, and the mise was joined as in a writ of right; F. N. B. 138. The proceeding is in fact in its nature a writ of right; *ibid*. The process is by summons, attachment, and distress; and if after appearance the tenant makes default, a grand distress issues forth; F. N. B. 128; see Brit. 150.

Another remedy, which is now superseded by the more efficacious and easy remedies of later acts of parliament, may be here mentioned, viz. the writ of *noctanter*. Its object was to protect the owner of the soil against malicious persons, who threw down his inclosures after he had approved parcel of the waste. It was enacted by Westminster, 2. 13 Ed. 1. c. 46. that if any, upon just title of apprevement, do make a ditch or hedge for that purpose, which is afterwards thrown down by some who cannot be discovered by verdict of the assize or jury, and the towns adjoining will not indict such as are guilty of the fact, in such case the said town shall be distrained to level again such ditch or hedge at their own costs, and also shall yield damages. The statute included a grantee of commons, owners of wastes, and even grantees of the herbage; 1 Show. 106; though an objection was made that the statute does not extend to every lord, but only to such as approve; 10 Mod. 153. The proceeding under the statute was to obtain the writ out of Chancery returnable in the K. B., with an intervening time of 15 days, between the test and return; 1 Show. 80; 3 Salk. 167. It is not necessary to state what estate the plaintiff has, Cro. Car. 280; 3 Salk. 167; Carth. 144. It is to be observed, however, that possession in some one should be averred; 1 Show. 106; Carth. 239. The writ thereupon is directed to the sheriff of the county to make inquisition relative thereto. On the return of this writ by the sheriff that the same is found by the inquisition, and that the jury are ignorant who did it, the return being filed in the Crown Office, there goes out a writ of inquiry of damages, and a *distringas* to the sheriff to distrain the circum adjacent vills to repair the hedges and fences so destroyed at their own charge, and also to restore the damages, &c.; see Ca. Temp. Hard. 355; 1 Keb. 358; 1 Show. 106. The charges for the defence of the several vills must be raised by agreement; and if they cannot agree, each vill is to bear their own charges. In general a year and a day is allowed for the purpose of discovering and indicting the offenders; 2 Inst. 476; 1 Lutw. 53. But it has been determined that no title can be made to so long a time as a matter of right, but that a convenient time ought certainly to be allowed; Skin. 94; 3 Salk. 167. Cro. Car. 440; 10 Mod. 157. On the neglect of the vills to indict within a year and a day, the lord shall also have an action on the stat. in the same manner as a man who is robbed has by the statute of Merton against the hundred; 1 Rol. Rep. 365. So there appears to be two remedies, one by action after the year and a day, the other by *distringas* on inquest and writ of inquiry within a convenient time after the offence. And it has been determined that there need not be any notice of the execution of the writ, because it is traversable; 3 Salk. 167. Rex v. Penrith inhabitants. Sometimes two writs of *distringas* have been moved for, one for the damages, the other for the building up the fences; but the Court generally embodied such damages in the writ; 2 Keb. 663. 683; 723 1 Mod. 65; 1 Sid. 107; 1 Keb. 485; 1 Lutw. 157.

Where the proceeding is by *distringas*, the inhabitants are allowed to come in and plead, and although at first doubted, it was finally determined that each *distringas* ought to contain a *scire facias*; 1 Sid. 107; 1 Keb. 655; 1 Lutw. 157; Cro. Car. 580; 3 Salk. 167; Sty. 417; 1 Keb. 479. But where the inhabitants did not appear and plead, it was insisted that they should not be allowed to make exception to the return of the inquisition; Cro. Car. 281. The following pleas will be sufficient answers to the claims made upon the inhabitants; for instance, where the mischief complained of has happened in a forest, they may say that the inclosures were made without the king's licence, Cro. Car. 281. Again, they may plead that the malefactors were known, or that the injury complained of was done before the face of the owners; Lev. 108; or with the connivance of the prosecutor; Carth. 240; or that they have indicted one or more of the offenders; Cro. Car. 433; or that the injuries were not done in the night; 12 Mod. 30; 2 Show. 256; or that they are not the next adjoining vill, *ibid*; or that they pulled down the hedges because they were erected there to the damage of the commoners; Ca. Temp. Hard. 355. And by protestation they may except to the excessiveness of the damages found by the inquisition; 1 Rol. 229; Carth. 239. But where they had neglected to make this protestation before the issue was found against them, the Court refused to allow them to plead it afterwards; 1 Sid. 212; 1 Keb. 695; 1 Lev. 117. So it is their duty to traverse material facts, such as

(c 1) *As to the action on the case.*

An action on the case may be brought by the lord against any parties through whose acts he may sustain any consequent injury.

2 *Of the parties to the action.*

THE PROVOST AND SCHOLARS OF QUEEN'S COLLEGE, OXFORD, v. HALLETT.
M. T. 1811. K. B. 14 East, 489.

A reversioner sued his tenant, lessee of the manor, for wrongfully inclosing and subdividing parcels of the common, although it was urged that before the expiration of the lease, the premises might be restored to their former condition; the Court declared that the action was well brought, and that the acts complained of were a present damage to the title of the plaintiff.

3. *Of the declaration.**

In drawing the declaration to suit the various forms of action just mentioned, the rules observed in general must be adhered to. It may be here said that ejectment has been holden to lie for the moiety of a manor. It is, however, more advisable to state the quantity and species of land sought to be recovered; see Adams on Ejectment, 28th Hetl. 146; Litt. Rep. 301; Lutw. 61.

the due execution of the writ, or the quantity of mischief done; Carth. 242. The clauses of 13 Ed. 1. c. 46. have been, however, much amplified by the more recent statutes, and which give at the same time a more summary remedy; see Woolrych, 216

By 6 Geo. 1 c. 16. s. 1, if any person or persons shall, either by day or night, break open, throw down, level, or destroy any hedges, gates, posts, stiles, railing, walls, fences, dikes, ditches, banks, or other inclosures of such woods, wood grounds, parks, closes, or coppices, plantations, timber trees, fruit trees, or other trees, thorns or quicksets, such lords of manors, or owners or proprietors of the same, as are, or shall be, or may be damaged thereby, shall have such remedy, and have and receive such satisfaction and recompence of and from the inhabitants of the parishes, towns, hamlets, villages, or places joining on such wood springs, or springs of wood, &c., and recover such damages against the parish, &c. aforesaid, and in the same manner and form as for dikes and hedges overthrown by persons in the night, or at another season, when they suppose not to be espied, as in and by an act of parliament made in the 13 Ed. 1. intituled, "lords may approve against their neighbours' usurpation of commons during the estate of particular tenants," is set forth and provided, unless the party or parties so offending shall, by such parish or parishes, &c. be convicted of such offence within the space of six months from the committing of such offence or offences, any law or construction to the contrary in anywise notwithstanding.

By section 2. jurisdiction is given to two or more justices of the county, riding, city, town, borough, or corporation, wherein such offence or offences are committed, or for the justices in open sessions, upon complaint made by any inhabitant of the parish or parishes, &c., or the owner of such tree or trees, &c., or of any other, to cause offenders to be apprehended, and to hear and finally to determine respecting the said offence or offences; and such justices are empowered, on conviction, to inflict the same penalties and punishments mentioned in 1 G. 1. stat. 2. c. 48. which are, that the convicted offender shall be committed to the house of correction for three months, and be publicly whipped by the master of the said house of correction once every month during the three months; or if there be no house of correction in the said county, &c., that the said offender shall be committed to such prison as is appointed for other criminals for four months, and be publicly whipped by the common hangman or executioner, once every month during the four months. And by section 3. persons sued for any thing done in pursuance of the said act may plead the general issue, and give the special matter of their defence in evidence, and on a verdict for them, or if the plaintiff become nonsuit, or discontinue his action, they shall have treble costs.

By 29 Geo. 2. c. 36. after enacting that lords of manors may inclose parcels of wastes, with the consent of the commoners, for the planting or preservation of timber or underwood, it is declared by sec. 6. that the same damages as would be given under the stat. 13 Ed. 1. against parishes, &c. should be recovered against such parishes, &c. not convicting persons for cutting and destroying trees within such inclosures in six months next after the offence, and the provisions of the above statute are extended to acts done in the day as well as in the night. And sec. 7. gives justices the power of determining such offences as in the act of 6 Geo. 1., and of inflicting the same punishments. And by sec. 8. persons cutting, taking, destroying, breaking, throwing down, barking, plucking up, burning, defacing, spoiling, or carrying away any tree growing in any waste, wood, or pasture, in which any persons have right of common, shall be convicted in like manner, and incur the same penalty.

* The venue is necessarily local; 1 Taunt. 379. It was formerly the practice, if the cause of action arose in two or more villis, to award the *venire factas* out of each respectively; and in default of such a summons, judgment would then have been arrested, and a

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And the subsequent pleadings are in general guided by the rules adopted in other cases.

It will be, however, necessary to notice more at length the pleadings in trespass; for when such action is brought against commoners

they are of a peculiar nature.* It may be

here as well to enquire, before proceeding to the consideration of the particular form of

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such pleadings, who may prescribe jointly for rights of common

2d. How they are to proscribe; and 3d.

What prescription may be joined in pleading.

With regard to the first point it has been holden, that tenants in common joint sue tege ther where the tort complained of is as great to the one as to the other.

4. Of the subsequent pleadings.

1. In answering the complaints made by the lord, the subsequent pleadings in the actions of ejectment and case, whether brought by him against a commoner or against a stranger, for a disturbance or encroachment on his seigniorial rights, will not vary, they not being governed by any particular rules applicable to remedies at law connected with rights of common, but following the usual forms daily adopted in such forms of action.

2. FISHER v. WREN. M. T. 1688. C. P. 3 Mod. 250.

Trespass on the case. The declaration stated that the plaintiff was seised of an ancient messuage, and of a meadow, and of an acre of land, parcel of the demesnes of the manor of C., and set forth a custom to grant the same by copy of court roll; and that there were several freehold tenements parcel of the said manor, and likewise several customary tenements, parcel also thereof, grantable at the will of the lord; and that all the freeholders, &c. time out of mind, &c. together with the copyholders, according to the custom of the said manor, have enjoyed *solam et separalem pasturam* of the ground called G., parcel of the said manor, for their cattle *levant et couchant*, &c.; and had liberty to cut the willows growing there for the mending of their houses; and that the defendant put some cattle into the ground called G., which did eat the willows, by reason whereof the plaintiff could have no benefit of them, &c. Upon not guilty pleaded, there was a verdict for the plaintiffs. A motion was now made in arrest of judgment, when the following exception, *inter alia*, was taken, viz. that the profit alluded to was a profit *aprendre in alieno solo*, to which all the tenants of the manor were entitled, and that made them tenants in common; and therefore in this action, where damages are to be recorded, they ought all to join; and it was urged, that although it was true that in real actions tenants in common always sever, yet in trespasses *quare clausum fregit*, and in personation of al actions, they always join, the reason of which it was said was plain; because in those actions, though their estates are several; yet the damages survive to all, and it would be unreasonable to bring several actions for one single trespass. On the other hand it was contended, that although it was true that a common was no more than a profit *aprendre*, &c., yet one commoner might bring an action against his fellow; and that, besides, in the case before the court, they were not tenants in common, for every man was seised severally of his freehold:† *Adjournatur*. See Sir W. Jones, 275; Latch. 152.

3. DICKMAN v. ALLEN. H. T. 1688. C. P. 2 Vent 138.

Action upon the case, in which it was declared that the provost and scholars of King's College, Cambridge, were seised in fee in the right of the college, of a messuage in G., in Cambridge, and 160 acres of arable land, lying in the common fields of G. aforesaid; and the said provost, &c. and all those whose estate they have in the tenements aforesaid, have time whereof, &c. for themselves, their farmers, and tenants, of the said tenements, the liberty of foldage for all sheep depasturing in the common lands of G. &c. A lease was then alleged to have been made by the provost and scholars to A. B. of the said messuage *de novo* ordered; Cro. Eliz. 104; Cro. Jac. 302. This was, however, remedied by the stat. 21 Jac. 1. c. 13. s. 2. And by 4 Ann. c. 16. s. 6, after premising that great inconvenience had arisen by the going off of trials from default of hundredors, it is enacted that persons shall be taken from the body of the county wherein each issue is triable, by which salutary provision the old law in this respect as to villas and hundreds is now abrogated. Still, where the waste in which the common is claimed lies in one county, and the land to which the right appertains is in another, it seems that the jury shall be equally nants, may drawn from both counties; Cro. Eliz. 471. Of course, if the cause of action arises entirely within a county, one *venire* will suffice; Cro. Jac. 550; and 2 & 3 Keb. 103. 166; and ther where Woolrych, p. 309. &c. For Forms, see Petersdorff's Index, Civil Div. tit. "Common." * For Forms, see Petersdorff's Index, tit. "Common," Civil Div.

† So a husband seised of common in right of his wife may sue for a disturbance without joining her; 2 Bulst. 14. When however he prescribes for a common in right of his wife, he must allege a *que* estate in himself and his wife, and the estate in his wife; Noy. Rep. 66. And there seems not to be any reason why a tenant for life, and the reversioner, should not join, for they claim under the same prescription; see Woolrych on Rights of Common. 285.

suage, and 160 acres of land for 20 years, which said A. B. let them to the plaintiff for six years, by virtue whereof the plaintiff entered and was possessed. The declaration next averred that the said defendant, not ignorant of the premises, did put 200 sheep into the common fields of G., and there kept and depastured them for a certain time; but that defendant did not properly fold the said sheep as he ought, nor permitted the plaintiff to enjoy the benefits to be derived from his right of foldage, by reason of which he was damaged to a certain extent. The defendant pleaded not guilty, and a verdict was found for the plaintiff; but the judgment was subsequently arrested, on a ground foreign to the point now under consideration.

4. *MOSSE V. BENNETT*. H. T. 1722. K. B. 8 Mod. 120.

Trespass on the case for disturbance of common, by covering so much of the common filled with hurdles, &c. Plea in justification, that the college of New Elme, in the county of Oxford, was seized in fee of the lands in the declaration mentioned, and being so seized made a lease thereof to the defendant for life, and that he (the defendant) had a right by prescription to have a fair on the said common every year, on such days in the year, and to have hurdles to keep and inclose cattle there, and a right to so much ground on the said common, as would keep the said hurdles from fair to fair. And upon a demurrer to this plea, it was objected that it was ill and repugnant, because a seisin in fee was laid in the college, and an estate for life in the defendant; but it was disallowed, for it is good *reddendo singula singulis*. [637]

ing so seized made a lease to the plaintiff, the prescription was holden good.

5. *POTTER V. NORTH*. M. T. 1668. K. B. 1 Saund. 351. S. C. 1 Vent. 383.

It was a question, whether a prescription by freeholders and a custom by copyholders might be joined in the same declaration. The Court seemed inclined to think the prescription good, although it was agreed that an entire thing could not be claimed by prescription and custom together, as was done in the case before the Court; for the grant to the freehold tenants, and the usage of the copyholder, could not begin together, on the ground that the common was first enjoyed by the usage of the copyholder, and then by the grant of the lord immediately to the freehold tenants.

6. *UNDERWOOD V. SAUNDERS*. M. T. 1675. K. B. 2 Lev. 178.

Declaration in case that plaintiff was seized of such lands, and that he and all those whose estate he had, *simul cum quibusdam aliis teneantibus* *tenent per copiam curie de manerio in J.* time out of mind, &c. have had *solum pasturam* in such a close, from such a time to such a time, and that the defendant disturbed him. General demurrer on the following grounds: 1st. That *cum quibusdam aliis teneantibus* was uncertain, both as to what kind and what number of tenants; 2d. That *de manerio in J.* did not sufficiently show what manor, for several manors might be in one vill, and every manor had a particular name. For these reasons the Court held the declaration defective, and gave judgment for defendant. [638]

7. *HUTCHINSON V. JACKSON*. T. T. 1686. C. P. 2 Lutw. 1324.

Declaration in trespass. Plea that A. B. was seized in fee of the manor of S., of which *locus in quo*, and also a messuage, &c. are parcel; that the said messuage, &c. are copyhold lands, and descendible *jure hereditarii*, as by the

* A tenant in fee simple has an estate of sufficient dignity to prescribe in his own name; applicable 6 Rep. 60; but a tenant for life, or years at will, or by *elegit*, must use the name of the fee when they prescribe, by reason of the weakness of their estates: 7 E. 4. 26, 6 Rep. 60, Dy. 71, 9 E. 4. The title of a rector to a common is, that he hath been and is rector of the parish church of A., and seized as such rector of the premises which give the right of common, and that his predecessors, rectors of the rectory, have been used to have common in respect of these premises: 3 Chit. pl. 544: Willes, 282. It is said, that if A. and as a ge be seized of 20 acres, to which common is appendant, and enfeoff B. of 10 acres, B. may prescribe specially, to wit, that A. had common appendant to the whole till such a day and then B. purchased, after which he put in his beasts according to due appointment, stated that in pleading a right of common, the com

† Two prescriptions, however, cannot be joined in the same count, as to have common for his sheep appurtenant to one house, and the like to another, for a distinct title is in such case necessary; Dy. 164.

manor must be hereditary right called tenant-right, that the said A. B. granted them by copy, out of his life.*

As whether there be these facts amounted to a justification. The plea was demurred to, on the ground that it was repugnant to say that lands were copyhold, and yet disseizable. The Court allowed the demurrer, observing, that the allegations were manifestly inconsistent with each other.

2. *FELLEY v. TUCKER*, T. T. 1755 K. B. 2 Ad. Raym. 1188.

The former *Per Cur.* A customary tenant in a fee simple within a manor may prescribe in his own name. See *F. & M.* 310; *Jen.* 278.

3. *HOSKINS v. RUSSELL*, H. T. 1769 K. B. 2 Saund. 320.

From this case it would appear, that as tenants by copy claim only by custom, they need not show their estates in certain, as whether they are in fee, for life, or for years, &c.; but that the law with regard to freeholders, is different.

10. *DART v. WATTS*, H. T. 1762 K. B. 1 Keb. 652.

In this case, which was an action of replevin for two beasts taken in A., the avowry stated the beasts to be the party's frank tenement. The plaintiff rejoined by custom for all the copyholders of Blackmere in the manor of D. to have used to have common in A.: to which the avowant demurred, because he should have prescribed in the lord's name, A. being out of the manor. The truth, however, appeared to be, that A. was anciently parcel of the manor, and had been lately severed by the lord. But the Court said: in general cases the copyholder sets forth that every customary tenant of the premises has had from time immemorial the right of common which he claims on a certain waste, also being within and parcel of the manor, as belonging to them; but, when the waste is situated in a stranger's soil, the prescription should be in the name of the lord: namely, that the lord of the manor and his ancestors, and all those whose estate he has, have had common for their customary tenants in the waste. The party ought, therefore, in this case, to have prescribed specially, that the lord had, up to such a time, common for his customary tenants, and that, at that time, the lord enfranchised the tenement; and that, since that time, the fee-flee and his tenants have had the right of common. See 4 Rep. 31; *Cro. Eliz.* 390; 1 Bulst. 19. 1 Saund. 343; 5 Taunt. 377; *Dy.* 364; 2 H. Bl. 566. In a stranger's soil, and in that case the prescription should be in the name of the lord, as it is always essential that the real basis on which the prescription rests should be developed.†

11. *ENGLISH v. BURNELL*, T. T. 1765, 2 Wils. 258.

Replevin for taking plaintiff's cattle: avowry, that Burnell was seized in fee and in possession of a certain ancient messuage, and that Ingham was tenant and occupier of another ancient messuage; and that Burnell, as owner and occupier of the messuage then in his possession, and Ingham, as owner and occupier of the messuage then in his possession, and all other occupiers of the said messuage, have had time out of mind, and of right ought to have, common of pasture in the *locus in quo*, &c., and that they therefore, took the cattle dam-

† In the plea he states his freehold in a certain messuage and lands, describing their situation and his occupation of them, and says, that from time immemorial he, and all those whose estate he has in the said messuage and lands, have been accustomed to have for himself and themselves, his and their tenants and farmers, being occupiers thereof, common, stating the nature of it as belonging to those premises; *Cro. Jac.* 436. If the right of common be qualified, either for a limited number, or a particular description of cattle, or at particular times of the year, or if the defendant have any land in the *locus in quo*, the plea must be framed accordingly. See also the precedents, *Rast. Inst.* 618; 1 Saund. 222; and the notes to 1 Saund. 339-46 and 347-53, and 2 Saund. 1 to 6, and 324-9, and *Com. Dig.* tit. Pleader; and tit. Common, as to the mode of pleading rights of common in general. If there be any reason to apprehend that the prescriptive right of common may have been extinguished by unity of possession, it is proper to add a plea claiming the right of common by non-existing grant.

* It has been held, that when a feoffment is pleaded, it shall be intended to have been by deed; *Cro. Car.* 482; *Cro. Jac.* 411.

† After this, the grant of the copyhold and the admission are set forth with the consequent entry of the tenant. The defendant in his plea then said, that having occasion to use his common, he put his cattle upon the place in which, &c.

Care must be taken not to join irreconcilable interests in such a plea.

age feasant. The plaintiff pleaded in bar, and traversed the right of common, [640] and thereupon issue was joined, and a verdict given for defendants. The Court afterwards amended the judgment, observing there was a defective title in one of the defendants; and, although the first defendant had pleaded his right well, yet a plea could not be good in part and bad in part, and a prescription in respect of mere occupation was of course void.

12. STOTT v. STOTT. M. T. 1812. K. B. 16 East, 343.

Trespass *quare clausum fregit*, &c. Plea, that defendant was seized in his demesne, as of fee of a messuage in the parish, and that he and all those whose estate, &c. have a right of way for himself, his and their farmers and servants, the occupiers of the messuage, &c. over the *locus in quo*, to and from the messu- age, &c. as appertaining thereto. A verdict was taken for the plaintiff, under in certain restrictions. A rule nisi was afterwards obtained to enter the verdict, upon the issues which had been entered for the plaintiff, for the defendant; when it was, *inter alia*, contended, that the plea should have gone further, and alleged that the defendant was the occupier of the messuage and land, in right of which he claimed the prescription, in order to bring him within the prescription, which was for occupancy only. But the Court said, that the allegation of seisin was sufficient, and *prima facie* implied occupation, unless the contrary be shown in pleading, and that the plaintiff should have replied that the occupation was in another if he had meant to insist on it. See 4 M. & S. 387.

13. CLARK v. KING. E. T. 1789. K. B. 3 T. R. 147.

Action of replevin. Cognizance by defendant as bailiff of A. B., and justification taking the cattle as doing damage in the *locus in quo*. The plea in bar stated a prescription for common; but it was not expressly alleged that the owners of the estate had used it from time immemorial. The replication traversed the right as stated in the plea in bar. The plaintiff had a verdict. A motion was now made in arrest of judgment; but the Court refused the rule, observing: although this is not accurately stated, yet, at any rate, it is sufficient after verdict. It states a right of common in all those who held the estate; and unless a prescriptive right had been proved, the plaintiff could not have obtained a verdict. See Gob 347.

14. CLARKSON v. WOODHOUSE. M. T. 1784. K. B. 5 T. R. 412. n.

An objection was made to a custom of a manor, which was relied on in this case as authorising certain parties to hold moss dales in severalty, and which was pleaded as existing within a certain manor, on the ground that the custom appeared in evidence to attach to many ancient messuages out of the manor; but the Court upheld the custom, saying: where an individual has enjoyed a right, time out of mind, without being able to trace the origin or foundation of his right, a grant is presumed; and therefore, if the occupier of a certain messuage has enjoyed it, he must claim it by prescription; but when the claim depends on a general rule of property within certain limits, it is alleged as a custom, or *lex loci*. All local or real property must be governed by such law: it has no relation to persons out of the limits. Property in England, Ireland, Jersey, &c. must be enjoyed according to the laws of each. So this moss, though granted to persons out of the manor, must be enjoyed subject to the laws of the manor.

15. HOCKLEY v. LAMB. H. T. 1699. K. B. 1 Ld. R. 645.

This was an action of trespass. The plaintiff claimed a right of common in a field, *a tempore fractionis campi*. There was a verdict for the plaintiff. A motion was made in arrest of judgment, on the ground that it did not appear what common was claimed, the law not giving any construction to words *a tempore fractionis campi*. And it was the opinion of Holt, C. J. that and specific

* The omission of the vill in which the premises lie which confer the right is also fatal; in its Cro. Jac. 238. The inaccuracy of the plea in this respect is cured by the stat. 16 & 17 terms; † Car. 2. c. 8.

† For if the right given in evidence differ from that claimed, so that one entire prescription is not proved, the claim will fail altogether; Noy. Rep. 67. But this distinction must be noticed as drawn in the books, that where the prescription varies in the species and not in the number of cattle, the inaccuracy will not totally vitiate it; see Cro. Eliz. 722.

such uncertain pleading could not be aided by the verdict; but Gould, J. thought the contrary.

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16. *PEFFIN V. SHAKESPEAR*. T. T. 1796. K. B. 6 T. R. 748.

The defendant pleaded to an action of trespass, that a certain customary tenement was granted to him in fee, according to the custom of the manor, and that all the tenants of that tenement had immemorially taken loam, sand, and gravel, for their necessary repairs, and that he therefore entered on the waste to dig such loam, &c. for the repairs of his house. The Court were of opinion that there ought to have been an express averment that the house was out of repair, and that the entering and digging were for the purpose of procuring loam, &c. for the repairs of his premises; for the plaintiff might have traversed these facts, and they gave judgment against the plea.

17. *DA COSTA V. CLARKE*. T. T. 1801. C. P. 2 B. & P. 257; S. C. not S. P. 2 *ibid*. 376.

Or dura
tion;

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A plea in bar to an avowry in replevin averred that the "*locus in quo* was and is parcel, &c. and from time whereof, &c. hath been, and ought, &c. and still of right ought to be open and common, in manner following; that is to say, open every third year, to wit, *on or before* the 15th day of October, when the corn was cut and carried off the same for a long time, to wit, for three weeks and upwards." The plea then set forth the plaintiff's title, and continued that "the party being so possessed before the said time when, &c. put the said cow, being his commonable cow, &c. into the said field, &c. as it was lawful for him to do, the same time, and from thence until and at the taking of the same as aforesaid, being when the said field was and ought to be open and common as aforesaid." Replication, that the said field, &c. "ought to be open every third year, only whilst every part thereof has been unsown with corn and grain." The rejoinder traversed this; and, on issue joined, the plaintiff had a verdict; a rule nisi to enter judgment for the defendant *non obstante veredicto* was obtained, on the ground that the right was not sufficiently described. Lord Eldon, C. J. held, that as no particular time was alleged as the period when the cow was put in, the words "when the field was and ought to be open and common as aforesaid," might be taken to refer to either the "three weeks," mentioned, or the time intended by the word "*upwards*," and that such uncertainty entirely invalidated the plea; though it would have been much strengthened by an averment that the cow had been put in within the three weeks, &c.—Rule absolute.

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18. *HAWKINS V. ECKLES*. H. T. 1801. C. P. 2 B. & P. 359.

Defendant in this case averred the taking in his own right, and averred that he being seised in his demesne, &c. of and in a certain, &c. has, and all those whose estates, &c. have had, and have been accustomed to have, and of right during all the time aforesaid ought to have had, and that he, the said defendant, still of right ought to have common of pasture in and throughout the said place in which, &c." The plaintiff demurred specially, on the ground that the defendant had omitted to allege any particular time when the right of common commenced in each year, or whether it subsisted during the whole year. It was contended for the defendant, that in absence of proof of a right of common for a less period than a year, the words "*during all the time aforesaid*," must be holden to mean that the right of common attached during the whole year. The Court held the avowry bad; but offered leave to the defendant to amend, which was assented to.

19. *ROBINSON V. RALEY*. E. T. 1751. 1 Burr. 316. S. P. *CUNDALL V. HODGSON*. 2 Lutw. 1395.

Action of trespass for breaking and entering the plaintiff's close, and de pasturing it with, &c. Plea, of right of common. The plaintiff traversed the right of common. All these issues were found for the defendant. The replication traversed the plea to the fifth count "that the cattle were the defendant's own cattle, and that they were *levant et couchant* upon the premises, and commonable cattle." To this there was a special demurrer for cause, viz. that the replication was multifarious, and that several matters specifying

them were put in issue, whereas only one single matter ought to be so. Per Lord Mansfield. The substantial rules of pleading are founded in strong sense, and the soundest and closest logic, and so appear when well understood and explained; though by being misunderstood and misapplied, they are often made use of as instruments of chicane. As to the present case, it is true issue must be taken upon a single point; but it is not necessary that this single point should consist only of a single fact; here the point is, the cattle being entitled to common; this is the single point of the defence. But in fact they must be both his own cattle, and also *levant et couchant*, which are two different essential circumstances of their being entitled to common; and both of them absolutely requisite. [643]

20. *BEAU v. BLOOM*. M. T. 1773. 3 Wils. 456; S. C. 2 Bl. 926.

This was a special action upon the case for disturbing the plaintiff in his right of common, and right to cut and take rushes upon the common for litter for his cattle, by ancient custom. Plea not guilty. A verdict was found for the plaintiff. A motion was now made in arrest of judgment, when amongst other things, it was urged that the plea was double, as it consisted of a claim of two distinct and several rights; viz. a right of common, which doth not lie in *prendre*, for the plaintiff cannot cut and take away the grass from off the common, but can only feed and take it by the mouths of his cattle; and a right to cut and take away rushes, which lies only in *prendre*, and cannot be joined in the same count with the right of common, which doth not lie in *prendre*. It was, however, contended that the right to cut and take away the rushes is only a circumstance attending, or part of the right of common, and that both together may be reasonably taken and considered as one united right.—Judgment for plaintiff. Such as in the nature of the claim;*

21. *WHITE v. COLEMAN*. M. T. 1672. K. B. 3 Keb. 247.

In replevin for taking cattle at Launceston, the defendant justified the taking in the parish of Lantejos, without this that he took them at Launceston. The Court held this an evident departure. Or depart ture;

22. *ELLIS v. ROWLES*. M. T. 1750. C. P. Wils. 638.

Defendant in a plea justified taking cattle damage feasant, and afterwards rejoined, that they were taken surcharging the common. The rejoinder was objected to, on the ground that it was a departure from the plea; that the defendants, in their plea, replied on the damage feasant, and, in their rejoinder, on a surcharge of common, which did not fortify the matter contained in, but was a departure from, the plea; and that the defendants might have pleaded the surcharge of common at first. The Court were of opinion that the objection was well founded. See Co. Litt. 304. a. For where, for example, plaintiff's surrejoinder admitted defendant's right of common, but complained of a surcharge.

23. *PALMER v. STONE*. T. T. 1659. C. P. 2 Wils. 96.

Declaration in trespass for impounding plaintiff's mare. The defendant justified damage feasant to the king in his forest of Waltham. Plaintiff replied; that A. F. was seised of messuage and land near the forest, and had a right of common in the forest for one mare or one gelding, in respect of every 80s. infected rent, every year, at all times of the year, except in the fence month: that A. F. demised to the plaintiff, who entered and possessed; and that, at the time of the trespass, the rent of the farm exceeded 60l. per annum, and that (out of the fence month) he put in his mare into the forest to use his common, when defendants, of their own wrong, took and impounded her. Defendant rejoined, that the mare was mangy, and doing damage, and therefore defendant took and impounded her, because she was wrongfully and unlawfully in the forest. The Court thought that this was a clear departure from the original pleading, and bad, since the mare's right to be there, under certain circumstances, had been [644] Or of cattle with a disease being put on the common, whereas the privilege under any circumstances had been previously completely negatived, the pleadings were considered defective.

* It is not always necessary in pleading to state the common as appurtenant to land *eo nomine*; for if it be laid as appurtenant to a thing which in the intentment of law *prima facie* comprehends lands, it is sufficient on the face of the plea; 2 Brownl. 101; 1 Ld. Raym. 726; Vaugh. 253; Co. Lit. 649. a; 2 Ld. Raym. 1015; Sir T. Jones, 227. But still it must be proved at the trial, either on the general issue in a declaration, or upon the issue of levancy and couchancy in a justification.

It is almost admitted; but, because the plaintiff had traversed a matter of law in his surrejoinder, the defendant had leave given to amend.

24. SMITH V. BAYNARD. M. T. 1673. K. B. 3 Keb. 388.

In this case, which was an action of replevin, the defendant avowed damage feasant. The plaintiff replied that the *locus in quo* adjoined to the common to which the plaintiff's ground was contiguous, affirming that the waste had never been separated by any inclosure or fence sufficient to prevent the escape of cattle from one common into the other. He then averred that the cattle accustomed to use these commons had always mixed together of their own accord, and set forth that the place where his own right existed was the freehold of A. B.; that his cattle were put there by A. B.'s licence, and that (the commons still adjoining to each other, the cattle, without his knowledge, strayed into the other common, in which, &c., and then justified the trespass complained of. The Court held that the replication was sufficient, without saying that he and all those, &c. and this not being an interest, but an excuse for a trespass, the cattle need not be said to be *levant et couchant*, for the court will not intend them to be strangers.

25. GULLETT V. LOPES. H. T. 1811. 13 East, 348.

In this case it became a question whether a right of common of vicinage existed under the following circumstances. It appeared that immemorially, and until the inclosure hereinafter mentioned, commons A. and B. adjoined each other without any separation by a fence on the side of common B. towards the north and east; and that, until such inclosure, the cattle of the commons wandered, by reason of vicinage, into the other; and that the inclosure made on one of the common was done in such a manner as to leave open only a passage sufficient for the highway which led over the one to the other. The Court held that without a complete inclosure and separation, the cattle might still stray from the one common to the other without impediment, and that the common by vicinage was not excluded.

establish a mutual privilege of intercommoning.

26. MOSSE V. BENNET. H. T. 1724. K. B. 8 Mod. 120.

Trespass for enclosing three acres of common with hurdles, and covering three more. Plea, prescribing to have a fair on the common, and that the hurdles were used to keep and inclose cattle there, and so justifying inclosing three acres, and covering three acres; but the Court held that the plaintiff's complaint of a disturbance in six acres had not been answered, as the plea had omitted to state that the last were different acres from the first. See 1 Keb. 391. 453; 1 Sid. 106; 3 Burr. 1385; Com. Rep. 341.

other pleas of justification; for instance, the right should be amply stated, so as to answer the whole declaration.

27. EARL MANCHESTER V. VALE. M. T. 1666. K. B. 1 Saund. 27.

Trespass. The defendant pleaded seisin in fee in A., and that A. appointed the defendant to take care of his cattle put into the close in which, &c. and then said that A. caused divers of his commonable cattle to be put into the close in question; whereupon the defendant, as his servant, entered to take care of them; but as he neither said that the cattle were his own, nor that he had put them on the *locus in quo*, and consequently that he could not be guilty of the trespass; the Court considered that the plea was bad.

28. MELLOR V. WALKER. H. T. 1669. K. B. 2 Saund.

This was an action of trespass, which was alleged in the declaration to have happened on the 1st of April, and the defendant justified on the first of August. The Court intimated, on overruling a general demurrer, that had it been special, they would have supported it. See 2 Ro. Abr. 676; S. C. 1 Vent. 92.

strictly followed in the plea, if it be intended to justify the same trespass.

29. STEVENS V. WHISTER. E. T. 1809. K. B. 11 East, 51.

Declaration in trespass. The defendant pleaded not guilty. It appeared that the plaintiff had lands on one side of a certain lane, by which he became entitled to the soil and freehold of half the lane opposite to his inclosures, and that the defendant depastured his cattle along that lane, which cattle had tres-

passed on one of the plaintiff's inclosures. It was urged that these facts would not justify him in declaring for a trespass in the lane generally, as if he claimed an exclusive right to the whole. But the Court said the plaintiff had an exclusive right to part of the lane, and if the defendant meant to drive him to confine the trespass complained of upon the face of his declaration to that part of the lane which was his, he should have pleaded soil and freehold in another, which would have obliged the plaintiff to new assign. [646]

30. PRATT V GOONME, H. T. 1812. K. B. 15 East, 235.

In trespass *quare clausum fregit*, the defendant pleaded the general issue, and also a special justification that the *locus in quo* was part of a certain common field which was then allotted to him by the leet jury of the manor; the plaintiff replied to the special plea, after setting out the abutments of the closes trespassed upon, that the closes newly assigned were different from the defendant's allotment. The defendant pleaded not guilty to this new assignment; and it happening that the plaintiff could not prove a trespass any where, except on that spot allotted to the defendant by the leet jury, the judge directed a verdict for the plaintiff, on the general issue, and for the defendant, on the plea of not guilty to the new assignment: and on a rule to show cause why the verdict should not be entered generally for the plaintiff, the Court upheld the judge's opinion, saying, that not guilty to the new assignment put the whole of it in issue. The plaintiff, however, had leave to amend. Care should be, however, in such instance taken, that the closes newly assigned are not the same with those to which the defendant's plea applies.

31. COCKEREL V. ARMSTRONG. T. T. 1738. C. P. Willes, 101; S. C. 7 Mod. 247; Com. Rep. 582.

Trespass was brought for taking a horse. The defendants pleaded soil and freehold in the *locus in quo* in other persons, and justified as their servants, and by their command, taking the horse damage feasant. The plaintiff pleaded *de injuria*; on which there was a demurrer, showing for cause that the plaintiff had not traversed; and judgment was given for the defendants on the grounds above stated. To a plea claiming a right of common, the plaintiff cannot reply *de injuria*;

32. It will appear, that where the right of common or way, as stated by the defendant, is denied by the plaintiff, it is in general sufficient merely to deny such right, following the language of the plea, and concluding to the country. This rule has been most ably deduced from the cases in the books by Mr. Sergeant Williams: 1 Saund. 103. b; where he states, that courts of justice discourage unnecessary prolixities in pleading, because they tend to expense and delay, and that, therefore, where a defendant cannot take any new or other issue in his rejoinder than the matter he had pleaded before, without a departure from his plea, or where the issue on the rejoinder would be the same in substance as on the plea, that the plaintiff ought to conclude to the country; as where the plea states a defect of fences, a prescription for a right of common or way, &c. in which the better and shorter method is directly to deny the fact of defect of fences, prescription, and the like, without a formal traverse, and conclude to the country; 1 Saund. 103. b; 1 Ld. Raym. 641. But must either deny seisin in fee or other title to the estate as a plaintiff to which the defendant claims his right, or may deny the right of common as stated in the plea;

33. GERRISH V. RODBURNE. H. T. 1771. C. P. 3 Wils. 165.

* The matter new assigned must be consistent with the declaration, and not varying from, or more extensive than, the trespasses therein enumerated; Vin. Ab. Trespass, Win. 65; 4 Leon. 15, 16; 10 East, 79. 81; or those which the defendant has in his plea professed to answer; for a new assignment is merely to avoid the effect of the plea, which can only operate upon the trespasses thereby omitted; 10 East, 80. It should also only be of material matter, and therefore if the plea set up a right of way or common, &c. at all times of the year, the new assignment should not be that the defendant "at other times, &c." time in that case being immaterial; and in an action of trespass against several, if some of the defendants suffer judgment by default, and the others plead a justification, the new assignment should be as to all the defendants, and not merely to those who have pleaded, for that would be a departure; 2 Leon. 199; Com. Dig. Pleader, F. 11; and as the plaintiff avers that the trespasses new assigned are other and different to those mentioned in the plea, he waives or abandons the trespasses which the defendant has justified, and it is not necessary to plead over again to the new assignment any matter of justification necessarily covered by the plea; as if common of pasture at all times of the year be pleaded, and the plaintiff new assigns that the defendant entered at other times; Gouldsb. 191; Modre, 540; Cro. Eliz. 590; S. C. Moore, 460; Jenk. 6th Cent. 265.

For altho' a right of common may exist in the manor, it may be restricted in various particulars;

Or show such grounds as will establish a ground for the plaintiff's complaint.*

Or that the cattle were the defendant's own commonable cattle *levant et couchant* | 648 |

But the existence of the privilege has been sometimes traversed;

And under certain circumstances is generally adopted, as where it is intended to set up another prescription,

Inconsistency with the one relied on;

In which case it is necessary that the whole

Replevin Cognizance. A by-law was set out, which ordained that no person or persons should depasture any sheep, horses, &c. at a certain time, on a common therein mentioned, on pain of forfeiting 20s. for every sheep, &c. which should be depastured there contrary to the said by-laws. The Court asked how they could judge if the offence set forth was contrary to all former by-laws, when they were not put on the record? and they strongly inclined against the defendant, who had pleaded this by-law in excuse for detaining cattle; but the case was adjourned, and was not mentioned again.

34. **MILES v. ETTRIDGE.** E. T. 4 W. 3 K. B. 1 Show. 350.

Trespass for throwing down fences; justification for common pleaded. Replication, of licence from the defendant's father to make and continue the inclosure in question. But the Court held that the licence as pleaded was bad, because such licence determined on his father's death.

35. **ROBINSON v. RALEY.** E. T. 1757. K. B. 1 Burr. 320.

Trespass, for depasturing plaintiff's grounds with cattle. Plea, justifying under a right of common. Replication traversing such right; and, to one plea, traversing that the cattle were defendant's own, and that they were *levant et couchant* on the premises. The Court, in deciding a point that arose on these pleadings, *inter alia*, said: the replication *de injuria sua propria absque tali causa* will do in all cases where matter of title, and other things of that kind are not included in the *absque tali causa*; and if you admit them, you may then plead *de injuria sua propria absque residuo causa*, traversing that residue. *couchant* on the premises, concluding to the country and not with a formal traverse.†

36. **HICKMAN v. THORNE.** T. T. 1676. C. P. 2 Mod. 104.

In replevin the defendant justified for damage feasant; the plaintiff prescribed for common in the *locus in quo*. The defendant then alleged a custom that every freeholder might inclose in the common field against the rest; and on demurrer, for want of traversing the plaintiff's prescription, the Court held, that the custom ought first to have been pleaded, and then the prescription traversed. See 49 E. 3. 19; Bro. Trav. Pl. 42. & 169; 14 H. 6. 6; 1 Leon. 43.

37. **ROBINSON v. RALEY.** E. T. 1757. K. B. 1 Burr. 316.

A defendant prescribed to have reasonable estovers; and the plaintiff replied that the *locus in quo* was within a forest, and that the defendant's prescription to have estovers depended on the liberty of the forest. On an objection taken to the replication, the Court held that it was bad, for either the law of the forest should have been pleaded, or the defendant's prescription traversed. See 2 Mod. 104.

38. **KINCHIN v. KNIGHT.** M. T. 1749 K. B. 1 Bl. 49.

Trespass was brought for rooting up the plaintiff's soil with hogs. The defendant pleaded a right of common for hogs. The plaintiff admitted the right in his replication, but said that the hogs ought to have been rung, on which defendant demurred, saying that the first custom should have been traversed; but the Court held the replication good, on the ground, that the two prescriptions were not inconsistent with each other.

39. **MOSWOOD v. WOOD.** H. T. 1791. 4 T. R. 157.

To an action of trespass in the common, called Swanwick common, the defendant pleaded that Swanwick and Swanwick Green commons lay open to

* It is agreed that such a licence should be pleaded to have been made by deed, and that the omission so to state it is helped after verdict by the stat. of feofails; Cro. Jac. 574. Monk v. Butler; 2 Saund. 320. Hoskins v. Robins; Sir Thomas Raymond, 171. Ramsey v. Rawson; 1 Vent. 25. S. C. It was, indeed, argued in one case, that a parol licence would be sufficient where the licence was for one putting in of cattle, because no estate passed, but it may be suggested, that such a reason would not now avail, since under a general licence no estate passes, 1 Vent. 25; Ramsey v. Brown, but see Freem. Rep. 190, which seems to bear out this position.

† Though it is said that in the latter case, where the defendant has turned on his own commonable cattle, as well as other cattle, the plaintiff should new assign, stating that he brought his action for the depasturing the common with other cattle, and ought not to traverse the levancy and couchancy; 1 Saund. 346. a. The plaintiff may also reply an improvement, *ibid*.

each other, and prescribed for a right in both commons. Replication, traversing the prescriptions in Swanwick common, dropping Swanwick Green. Rejoinder, tendering issue on the prescription both in Swanwick common and Swanwick Green. Special demurrer, because the defendants, in their rejoinder, did not tender an issue on the fact traversed by the plaintiff in his replication, and because the issue tendered in the rejoinder is too large, comprehending not only the fact of the prescription traversed by the replication, but also a matter of fact not alleged nor traversed by the replication, and because the last prescription, so attempted to be put in issue, is wholly immaterial and irrelevant in this action, &c. Joinder in demurrer. *Per Cur.* All prescriptions are in their nature entire; and when they are pleaded, the adverse party cannot deny a part only, but must either demur or traverse the whole; but though a person plead a prescription in a more extensive manner than he need do, he must prove it as laid; and in that respect, he subjects himself to some disadvantage in thus pleading it. Then it is but just, on the other hand, that he should be entitled to any advantage which he can derive from the prescription which he pleads. Suppose, in this case, that the defendant can give some evidence of acts of ownership in Swanwick Delves, but much stronger evidence in Swanwick Green, he ought to have an opportunity of giving the latter in evidence, having first introduced a connection between both, which he could not be permitted to do if the prescription were confined to the former part only. If, indeed, the jury could separate the parts of the prescription in giving their verdict, then the plaintiff might sustain a disadvantage from the defendants pleading their general prescription with regard to the costs of that part introduced by the defendant in his own favour; but the jury must give a general verdict for the whole prescription one way or the other. The Court, however, gave the plaintiff leave to amend.

40. GRIFFITH V. WILLIAMS. M. T. 1752. K. B. 1 Wils. 339.

Trespass. Defendant justified under a prescriptive right to a duty called tensary, and to the like right to distrain for it. The plaintiffs traversed the right to the duty without traversing the right to distrain. Some exceptions were taken to the plea, and the custom; but as the whole court were of opinion that the traverse was well enough, they determined nothing concerning the plea, but seemed to think that such a custom could not be supported. Denison, J. said: suppose a man claims a right to common *pur cause de vicinage* in A. and B., it was never doubted but a traverse of the right in A. would be sufficient without traversing his right in B. Judgment for the plaintiff.

41. MELLOR V. WALKER. H. T. 1669. K. B. 2 Saund. 1; S. C. 2 Keb. 676; S. C. 1 Vent. 92.

The defendant, by virtue of a right of common, justified entering a certain close at a particular time, to wit, when a certain field was sown with any kind of corn, without this, that he was guilty of any trespass at any time after the said field was so sown with corn; and though, indeed, the Court thought, on demurrer, that the traverse had sufficiently answered the material part of the declaration, yet it seems that, at this day, such a plea would be holden badly on special demurrer, because of the addition of a traverse after a justification, which in itself would be a legal bar to the action.

42. MAYOR OF OXFORD V. RICHARDSON. T. T. 1793. Ex. Ch. 2 H. Bl. 182; S. C. 1 Anstr. 231. reversing S. C. 4 T. R. 437. S. P. PALMER V. STONE. T. T. 1759. K. B. 2 Wils. 96. [650]

In an action of trespass for fishing in the plaintiff's fishery, the defendant pleaded that the *locus in quo* was an arm of the sea, in which every subject of the realm had the liberty and privilege of free fishing. The plaintiff replied

* And it is material to traverse particular facts connected with the title to the common claimed, and without which the right cannot be substantiated, as the levancy and couchancy of cattle; 2 Show. 328; because the application of estovers; *ibid.* as necessary for repairing for example; 7 H. 6. 38; see 2 Leon. 209. &c.

† In framing pleas in bar in replevin, to avowries damage feasant the same rules must be adopted as have been just pointed out relative to the pleas to an action of trespass, whether they go to show plaintiff's right of common, or to negative defendant's privilege;

of a prescription should be traversed.* [649]

It need not, however, be so in express terms, if from the nature of the common it appear that the averments are tantamount to a direct traverse,

And a traverse should not be adopted after a sufficient confession and avoidance.

Nor made use of to negative an inference of law.†

The plain-
tiff must ne-
cessarily
produce
such evi-
dence as
will tend to
support the
pleadings.
But the de-
fendant, if
a common-
er may, to
nullify the
plaintiff's

a prescription for the sole and several right of fishing, and traversed that every subject had the liberty and privilege of free fishing in the *locus in quo*. The Court held that this traverse was bad, and that the defendant had done right in the court below in taking no notice of it in his rejoinder, and in traversing the plaintiff's prescription.

5. Of the evidence.

The evidence necessary to support the allegations in the pleadings must be adduced; but no particular rules exist in this case different from what must be attended to in other instances. The defendant must first, when he claims common appendant or appurtenant, prove the possession of some messuage or land to which such common belongs, or of a house so entitled, where the claim is for turves, wood, fish, &c

proof of property, show it to be conditional, by establishing his claim to a right of common.*

1. MORWOOD V. WOOD. H. T. 1783. K. B. 16 East, 338.

This may
be shown
by the testi-
mony of
old uninter-
ested indivi-
duals, or
by a grant
beyond
time of me-
mory.† In

[651]

the absence
of such
proof, repu-
tation may
be resorted
to;

Especially
if aided by
other confir-
matory evi-
dence.

And with
that view a
declaration
of a former
tenant of a
messuage
in respect
of which a
right of
common is
claimed, is
admissible
in evidence
of such
right.

The question which arose in this case was, whether general evidence of reputation, as to a prescriptive right of digging stones on the lord's warren annexed to a particular estate was admissible. The judges were divided on this question, Buller, J. and Grose, J. (Lord Kenyon and Ashhurst, J. contra) were of opinion that it might be received; but Buller added, that he thought it required other evidence of the right to be first laid as a foundation; but it seemed to be the prevalent opinion that such evidence might be given as to a particular custom, though not as a private prescription.

2. WEEKS V. SPARKE. T. T. 1813. K. B. 1 M. & S. 679.

To an action of trespass, a prescriptive right of common over *locus in quo* was pleaded; the plaintiff replied a qualified right there for tillage, and traversed the defendant's prescription; on this, issue was joined; the plaintiff first proved two instances of the exercise of his right of tillage upon the waste, and that the appearance of ridges and furrows there, showed a probability that it had once been entirely appropriated to tillage; and he proceeded to give evidence of reputation by several witnesses, which the judge, presiding at the trial, received; and on a rule for a new trial, the Court were of opinion, 1st. That this issue did in some measure affect public rights; 2d. That some foundation should always be laid for the admission of the proof complained of by an exercise of the right which lets in reputation, and this had been done by the plaintiff; they therefore discharged the rule.

3. WALKER V. BRODSLOCK. T. T. 1795. Exch. 1 Esp. 458.

On a feigned issue directed to try a right of common prescribed for as appurtenant to a certain messuage holden by the plaintiff, the defendant proved that one A. B., who had been tenant of the plaintiff's premises at a former period, had stated, in his life-time, that his cattle had been impounded on the common in question; and offered to show that another person, a previous tenant, had declared his opinion, while in occupation of the premises, that no such right existed. The plaintiff's counsel urged that this evidence was not adduced to prove the fact, but merely to show the tenants opinion, which he contended was good against the rights of such tenants. The evidence was admitted.

see Morg. 605; 2 Wils. 269; Boote's Suit at Law, 241-2-3; Plead. Ass. 472; 2 Rich. C. P. 340; and Petersdorff's Index, tit. Common.

* The evidence necessary to support rights of common, where they are pleaded in excuse or denial, must be of a nature more explicit and clear than it will be seen in some cases requisite in the proof, in support of a declaration by the commoner. It is entire, and must in substance be proved; one may, indeed, claim for horses and sheep, and recover in respect of a proof for horses only, as has been seen, but the number either of horses or sheep must be correct to sustain the pleading, and produce an unbroken substantial claim; 1 Mod. 105. So the proof of the nature of the common must be accurate; for it has been held, that the proof of a common of vicinage will not maintain a prescription for common appendant, for the former does not begin by a mere prescription, but on condition that other commoners should have common in like manner; 13 H. 7. 13; Bro. Gen. Issue, pl. 96.

† Since all the rights of common depend either upon a prescription or grant actually proved or presumed, much of the evidence on this subject is referrible to the more general heads of evidence of grants and prescriptions.

4. In the case of *Nichols v. Parker* (abridged *ante*, vol. 4. p. 664.) it is declared that hearsay evidence is admissible on a question of parochial or memorial boundary, although the persons who had been heretofore to speak of the boundary were parishioners, and claimed a right of common over the very wastes which their declaration had a tendency to enlarge, there being no litigation then pending. See *Peake's Evidence*, Appendix; 13 & 33; 11 East, 331; 1 T. R. 466; 5 id. 26; 3 Gwill. 854; S. C. 2 Ves. 512; 12 East, 62; 1 M. & S. 679; 1 Whitw., 112 [652]

5. *CHAPMAN V. COWLAN*. M. C. 1810. K. B. 13 East. 8

This was an action upon the case brought by a copyholder against a freeholder for disturbance of common. At the trial two parchments were produced from amongst the muniments of the manor, and purporting to be signed by many persons copyholders, stating an unlimited right of common, which, having been found inconvenient, they had agreed to stock the common in the manner which the plaintiff's witnesses had proved; and as these revealed a private agreement amongst the copyholders, the plaintiff was nonsuited, although it was objected that the instrument was not proved to have been signed by a majority of the then copyholders of the manor, nor that the plaintiff held the copyhold tenement of any one of those who had signed it. And on motion for a new trial, *Lord Ellenborough* said: Are not the instruments evidence at least of the reputation of the manor, at that time, as to the prescriptive right of common, against the right now set up by the plaintiff? They destroy the right insisted upon by the plaintiff, by showing what the prescriptive rights of the copyholders were before. And as an agreement it could have no effect to bind subsequent copyholders, but only those who executed it. It will be better to recur to the original right of common, as restricted by levancy and couchancy.—Rule refused.

6. *ADDINGTON V. CLODE*. F. T. 1775. C. P. 2 Bl. 989.

Trespass for breaking and entering plaintiff's close. Plea of right of common. The plaintiff traversed the right of common, and issue was joined thereon. At the trial two old grants, without dates were produced. Upon which opening, *Narcs, J.* who tried the cause, observed to the defendants's counsel that this grant was entirely inconsistent with the plea of prescription, in which they acquiesced, and a verdict was given for the plaintiff. A motion was made for a new trial, when the court were unanimous in granting a new trial; for either of these grants might have been before time immemorial, and it was fit that the decision of such a point should have been left to the jury. And altho' of memory, the Court will allow the production of ancient grants without date, the probability of the existence of which beyond time of memory must be left to the jury. And altho' a prescript grant be beyond time

7. *COWLAM V. SLACK*. H. T. 1812. K. B. 15 East, 1802.

In case for disturbance for common the plaintiff gave in evidence, that he, his father, and grandfather, had for 50 years previous to the trial stocked and enjoyed the common which he claimed; but, on cross-examination, it appeared that the plaintiff's messuage and lands had been holden during that time by him and his ancestors as tenants to the lord of the manor, on which the plaintiff was nonsuited, on the ground that unity in possession had extinguished the right of common. But the Court set aside the nonsuit; saying, that the usage should have been left to the jury, who might have been justified in presuming, that after so great a lapse of time a new grant had been made, especially as the common in question was appurtenant. Sometimes a new grant will be presumed, as from an uninterrupted possession of several years;

8. *DAWSON V. THE DUKE OF NORFOLK*. H. T. 1815. Ex. 1 Price, 246.

The question raised in this case was, whether the plaintiff was entitled, in respect of a certain manor, to a right of common over certain lands belonging to the defendant. On a feigned issue, it appeared from the evidence of several of the lands very old persons, that the plaintiff and his ancestors had frequently, as long as they could remember, depastured their cattle on the lands in question, which a trespass might easily pass unnoticed by the commoners in the manor.

* So where the right claimed is for common appurtenant, ancient parchments and writings containing grants of commonable right are often made available, and they will be received in evidence if drawn from a proper custody; *vide* 3 Taunt. 91. abridged *ante* vol. 4. p. 579. Unless, from the evidence of several of the lands a trespass might easily pass unnoticed by the commoners in the manor.

[653] were very extensive, and connected with other common land. The defendant relied on a judgment; on a verdict found in the year 1665, which defined the right of the customary tenants of the manor possessed by the plaintiff, and which restricted that right to the limits contended for by the defendant. The judge expressed his opinion, that as the plaintiff had failed in establishing a right previous to the year 1665, the question for consideration was, whether the evidence adduced would warrant a presumption of grant since that period, and he thought it was insufficient to that end. On the jury finding for the defendant, a rule nisi for a new trial was obtained, when the Court held that though it had been clearly proved that the plaintiff and his ancestors had exercised the right contended for, it must be supposed that such use had been by sufferance; it being impossible, or too troublesome an undertaking, to hinder the trespass. —Rule discharged.

Or the waste has been depastured through mistake and ignorance of the boundaries of two adjoining commons.

9. HETHERINGTON V. VANE E. T. 1821. K. B. 4 B. & A. 428.

The common of Wythop and Embleton lay open to each other, and the boundaries had not been ascertained till a dispute arose between two parties in the neighbourhood, on which the exact limit was discovered. The plaintiffs were possessed of a house and land at Embleton, but, through ignorance, they had for 60 years exercised commonable rights on Wythop; they had received a due allotment in respect of their profits on Embleton common, and now they sought for an allotment out of Wythop. The judge left it to the jury to say, whether this user was to be considered as an adverse enjoyment in Wythop, acquiesced in by the commoners there, or a mistake as to the boundary of the plaintiff's common; and the jury found a verdict for the defendant, which was sustained by the Court, who approved of the direction of the judge at the trial.

10. DRURY V. MOORE. M. T. 1815. K. B. 1 Stark. 102.

Evidence of long enjoyment of a right of common is, however, strong proof, unless rebutted by contrary presumptions.* Case against a lord of a manor for inclosing a common. Several very old persons proved that the plaintiff, and those from whom he claimed, had enjoyed the right contended for during a long period; it was also shown that the defendant, who was the lord, at one period by deed granted part of the common for the erection of a mill, for the advantage of the poor, subject to the confirmation of the commoners. The defendant offered to prove that a practice had existed, from an early date, for the lord of the manor to build houses and let them, with a part of the common annexed. But the judge observed, that the plaintiff's evidence was of so much higher a nature than that adduced on the part of the defendant, that it would be futile to produce it.—Verdict for plaintiff.

[654] 11. ROGERS V. BUNSTEAD. Cam. Sum. Ass. 1727. K. B. Sel. N. P. 440. MSS. 6th ed.

The next thing to be proved is the levancy or couchancy of the cattle; Trespass for entering plaintiff's close with cows and sheep, and destroying his grass. As to sheep, plea not guilty, and issue thereon. As to cows, defendant justified, and prescribed for common, for all cattle except sheep) *levant couchant* on defendant's messuage, and one acre of land: the issue was on the levancy, and couchancy. The evidence on the first issue was, that the defendant's sheep were seen at several times depasturing in *locus in quo*, and that at such time the defendant's shepherd was with them. It was insisted for the defendant, that as it did not appear that defendant had knowledge or consented that his sheep should feed there and had a servant to take care of them, the shepherd, and not the defendant, was the trespasser, and that the action could not be maintained against the master. Per Lord Raymond, C. J.—

* Where the right claimed is for estover, turbary, piscary, or the like, the evidence must accord therewith. Proof must in those instances be adduced of the plaintiff's possession of the house to which the right appertains. The party then shows his custom to take the profits for the purposes of repairing his house, for fuel, or for sustenance. The proof of common in gross, when claimed by grant, is by putting in the deed: or if by prescription, by calling as many old witnesses as can be found to speak to the long enjoyment which the plaintiff or his ancestors have had of the profits in question, of which the deed becomes a corroborating auxiliary, when a common appurtenant is by deed, the same course should be observed.

"The action lies against the master; his sheep did the trespass; he has his remedy against the servant." As to the second issue, the evidence was, that defendant was seized of a copyhold messuage, and one acre of pasture land, that he foddered eight or nine cows in the yard of the said messuage, with hay brought from another farm about two miles off. Lord Raymond, C. J. These cows cannot be *levant couchant* upon the one acre; for I am clear that levancy and couchancy is a stint of common *sans nombre*, and signifies only so many as the messuage or farm will by its produce maintain. I know there are cases which say, that foddering in a yard makes a levancy and couchancy; but the meaning is, foddering with stubble, &c. produced from the messuage or land itself, to which the yard belongs; for example, if an acre of land will produce only so much hay, &c. as will maintain but one cow, the occupier shall not put two on the common, because he foddered them in the yard with the produce of other land; for, by the same rule, he might put 1000 of his own, or of other persons, and deprive the other commoners of the benefit of common.*

12. FULCHER v. SEALES. Norfolk Sum. Ass. 1738. K. B. MSS. 1 Sel. N. P. 6th ed.

Trespass for impounding plaintiff's colt and three fillies. Defendant set out his right to a messuage with appurtenances, to which the defendant has a right of common belonging to the *locus in quo*; and that the defendant took the cattle damage feasant. Plaintiff replies, that he is possessed of a copyhold messuage in Drayton, and prescribes for a right of common in the *locus in quo*, for all commonable cattle, *levant et couchant*, on the same messuage at all times of the year. Defendant *protestando*, that plaintiff has not such right, traverses the levancy and couchancy of the beasts taken, and issue thereon. Per Lee, C. J. "The *protestando* is not part of the issue, and needs not to be proved." It appeared by the evidence, that the messuage was only a yard where the horses were foddered, and one acre of orchard, with the produce of which the plaintiff could not maintain the colt and three fillies, and for that reason he foddered them with hay and straw from other land hired by him. Per Lee, C. J. "These beasts cannot be *levant et couchant* on this yard, though they are foddered there, unless they can be foddered with the produce of the messuage, and so it was determined by Lord Raymond in Rogers v. Benstead, *supra*, p. 654, after much consideration, that levancy and couchancy signify what the produce of the estate will bear, and is a stint of common with respect to other commoners; and I know no difference as to this, whether the common is for the whole year, or for half a year only.—Plaintiff nonsuited.—See 1 Mod 105; 14 E. 4. 32.

* So if the plaintiff prescribe generally for commonable cattle, evidence of a right of common only for some particular species of commonable cattle will not maintain the issue; Pring v. Henley, Bull. N. P. 59; Rotherham v. Green, Cro. Eliz. 503; Bull, N. P. 60: 1 Campb. N. P. C. 309. 315.

† So many are *levant et couchant* as the land to which the common is appurtenant will maintain in winter; Noy. 30; Vent. 54; 6 T. R. 741: and common cannot be claimed as appendant to a house without any curtilage or land; Salk. 169. 2 Brownl. 101; 2 Ld. Raym. 1016; Noy 30. And therefore, where a plaintiff in an action for the disturbance of his right of common claimed the right for all commonable cattle *levant et couchant*, and it appeared that the house of which he was the owner had neither land, curtilage, nor stable belonging to it, the plaintiff was nonsuited; 5 T. R. 46. And, therefore, although the declaration, or plea of justification, allege the right of common to be appendant to a messuage, it must be proved that there is at least a curtilage belonging to it, on which the cattle may be *levant et couchant*; Sir W. Jones, 227. But in order to prove that the cattle in question are *levant et couchant*, it must be proved that they are connected with the land on which they are alleged to be *levant et couchant*; 1 Wil. Saun. 346. c. in note. In the case of a distress, those cattle only are said to be *levant et couchant* which have been there for a space of time long enough for them to have lain down and risen up again. But in a case of right of common appendant, levancy and couchancy is merely a mode of ascertaining the number of cattle which are entitled to the right of common. 1 B. & A. 706. The defendant must prove that the cattle are his own, or that he has a special property in them; Bro. Com. 47; 2 Show. 328; for a man has no right to use the common with the cattle of a stranger, or with his own cattle *levant et couchant* upon some other land, and not upon the land to which the right is appendant or appurtenant; but if he borrow cattle to compester his land, they may be put upon the common, for he has a special property in them; Skin. 137; F. N. B. 180; Roll. Com. 402.

Which evidence must be common-
sate to the claim.†
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Which in fact is no more than a general rule of evidence, and consequent ly combines in itself the universal maxim that though the party will be obliged

13 THE BAILIFFS, BURGESSES, &c. OF TEWKESBURY V. BRICKNELL. H. T. 1808. C. P. 1 Taunt. 152.

A declaration in case for selling corn by sample, having stated that the plaintiffs being possessed of a certain market in T. for the buying and selling of corn, were entitled, by reason thereof, to a reasonable toll on all corn brought into the said market for sale, except on corn sold there by or to any freeman of the said borough; and on corn of any other person legally exempt from the same; and it being proved that the exemption attached only on corn sold by a freeman, it was urged that the declaration was not proved as laid, and the plaintiff was nonsuited. But the Court made absolute a rule for setting it aside.

to prove as much as he claims, his case will not be prejudiced by proof of a more ample right.*

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But it has been hold en neces sary to sup port claim of common for cattle *levant et couchant*, that the common should be adequate to the support of the cattle for any length of time.

The next thing requir ed in proof is the exer cise of the right.†

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The plain tiff may, to rebut such proof, show whatever may go to overturn the right of common;

14. WILLIS V. WARD. M. T, 1818 C. B. 2 Chit. Rep. 297.

Verdict for plaintiff in an action for disturbance of common. Motion to set it aside, on the ground that the allegation in the declaration was, that the plaintiff was entitled to a right of common for all his cattle *levant et couchant*, whereas it appeared in evidence that the common was not sufficient to feed all the cattle for any length of time, and that the right could not possibly exist in the manner in which it was set forth. But the Court refused the defendant's application; and said, nature, it seems, has set a limit to the exercise of the right of common; but the plaintiff is clearly entitled to the right he avers he is possessed of, although, from the limited extent of the common, he would not be able to keep his cattle there long with benefit.—Rule refused. See 1 Saund. 28 & 28 a.; 1 B & A. 706.

15. BRYAN V. WINWOOD. E. T. 1808. C. P. 1 Taunt. 208.

In ejectment for a piece of ground which had been inclosed from the common, the plaintiff, as lord of the manor, proved acts of encroachment on the waste by himself and other freeholders of the manor, and the payment of quit rents to himself for like inclosures. The defendant appeared to be a tenant for lives, and to hold of the lessor of the plaintiff; but one part of the ground claimed had been inclosed 30 years before this action was brought, but during the lease, and had been holden without paying any acknowledgement. It was urged that the plaintiff was precluded by length of time; and an objection was urged that the fact of the plaintiff having proved his right to one part, could not be adduced as conclusive evidence of his title to the latter part. But the judge admitted the evidence.

16. As a general rule, it may be premised that whatever tends to defeat the right claimed will consequently operate as a bar to the prescription pleaded. The lord of the manor in which the waste is mav. for instance set up a defence of inclosure; some act of approvement should, therefore, be adduced to show

* When a party prescribes absolutely, and proves a prescriptive right, subject to a condition or limitation, the sufficiency of the proof to maintain the issue seems to depend upon this, whether the condition or limitation is part of one entire prescription, or whether it is not another distinct prescriptive right, and the subject of another action rather than a part of the prescription alleged. In the case of Branks v. Willet, 2 H. Bl. 224. where a prescriptive right of common appurtenant was claimed for a certain number of sheep every year, and at all times of the year, and this general right was proved, but it also appeared that the tenant of an adjoining farm was entitled to have the sheep folded on his lands whenever they were fed on the common, an objection was taken on the ground of a variance between the plea and the proof; but the Court of C. P. on consideration held, that the words "at all times," must be understood according to the subject matter, and the general course of feeding sheep, which seldom if ever remained during the night on the common, but were folded; these words must therefore be understood as meaning at all usual times, and the folding of the sheep at night was no part of entire prescription for common of pasture, but rather a consideration subsequent to the enjoyment of the right, and not necessary to be stated.

† Which must accord with the fact, as for instance, as to the number of beasts; 12 Vin. Ab. Com.; 13 H. 7. 13; or the season of the year; Carth. 241. Where estovers, turf, or the like commonable profits are prescribed for, for the purpose of repairs, &c. there should be an averment that the house, palings, fences, hedges, &c. stood in need of such repairs; or where they are claimed as appurtenant to a house to be used as fuel, proof should be given that they have been usually so expended.

his intention to inclose, and the courts will take notice judicially of his right to do so.

17. *WALKER V. BROADSTOCK*. Summer Ass. 1795. Ex. 1 Esp. N. P. C. 459.

To establish a prescriptive right to common appurtenant, *per cause de vicinage*, the defendants called witnesses, who proved that two several tenants, who had holden the premises prior to the plaintiff, of whom one was dead, and the other had no interest in the cause, had declared their opinion that no such right vested in the tenants of the land in question. It was contended that these declarations, being made by occupiers of the premises, must be considered good evidence against their own rights, and the evidence was admitted. Whether impliedly;

18. *DUNSTAN V. TRESIDER AND ANOTHER*. M. T. 1792. K. B. 5 T. R. 2.

To an action of trespass for breaking and entering the plaintiff's close, the defendant pleaded that the *locus in quo* was parcel of the manor of H.; and that an ancient messuage and land were immemorially parcel of the said manor, and that there is a custom in the manor that from time whereof, &c. the customary tenant for all the time aforesaid, has had right of common, &c. Replication, traversing the custom. It appeared that the plaintiff proved that the tenement was built within the last 20 years, and was not built in the site of any ancient messuage. It was contended that this evidence should not be admitted, urging that the antiquity of the messuage was admitted by the replication, which traversed the custom. But the judge before whom the cause was tried being of opinion that the antiquity of the messuage formed a part of the custom, and was involved in the issue, received the evidence, and the plaintiff obtained a verdict. On a motion for a new trial, the Court said: the verdict is right, as the evidence disproved the custom, which was traversed.—The rule must be therefore refused. Or expressly negating the privilege.*

19. *TYRWHITT V. WYNNE*. E. T. 1819. K. B. 2 B. & A. 554.

To an action of trespass the defendant, who was lord of the manor, pleaded that the *locus in quo* was his soil and freehold, on which issue was joined.—After some documentary evidence on the part of the defendant, it was proposed to read counterparts of leases of minerals granted to several persons, not connected with the plaintiff, in other parts of the waste of the manor, but not in the place in question. These deeds were rejected by the learned judge, and the Court upheld that opinion for two reasons: 1st. Because it ought to have been shown that the *locus in quo* formed part of the entire waste to which the leases were applicable, inasmuch as acts of ownership on the other parts of those waste could not prove that the *locus in quo* was part of them; and 2d. That if that had been done, still that they would only have been evidence of the defendant's right to the minerals under the *locus in quo*, but would not have established his title to the surface. But must establish a complete, and not a partial exclusive right to the soil;

20. *CLEARS V. STEVENS*. T. T. 1818. C. P. 2 B. Moore, 464; S. C. 8 Taunt.

413.

The defendant, in an action of replevin, acknowledged the taking as bailiff, and after stating a custom existing in the manor for a court leet to be holden before the steward for the time being when necessary; and that it had been the custom for the jurors of the said court to make such by-laws as they might deem necessary respecting the stocking, depasturing, &c. of the said common, and to inflict such penalty on all persons offending against such by-laws, as the said jurors should think expedient; and that there was a custom in the said manor to distrain in case of the refusal of any person who had been found subject to such penalty; averred, that at a court leet it was ordered that no person should keep on the said common any *steers after two years old*, on pain of a penalty; that the cattle, in the declaration mentioned, being *steers more than two years old*, were at the said time, when, &c. in the place in which, &c. wherefore the defendant as, &c. took the said cattle for the said damage as aforesaid. Existing at all events during the period to which the claim has a reference.

* On issue joined as to a right of common, the defendant may give in evidence a release of the right of common although he might have pleaded it; Clayton, 9; 8 C. 1. Such a release, however, will not avail where the common belongs to land which is entailed, and which cannot pass by release any more than the land itself; *ibid*.

Plea, that the cattle were at the said time when, *Sc.* *steers less than two years old, to wit, one year old*, on which issue was joined, The defendant had a verdict; and on a rule *nisi* to enter a verdict for the plaintiff, *non obstante veredicto*, Gibbs, C. J. held, that as the defendant's right to distrain could only arise from the refusal to pay the penalty imposed according to the custom, a refusal of the plaintiff to pay such penalty should have been stated in the defendant's cognizance, which was therefore bad —Rule absolute.

And it has been consequently held, that on a plea of enclosure, to prove that every part of the *locus in quo* has been inclosed.*

[659] Should an issue be joined on the sufficiency of common, the lord must show that he has not taken so much as to deprive his tenants of pasture for their cattle.†

The general rule is, that if the issue be on a customary right of common by the establishment of which the witness would be benefitted, he is incompetent;‡ but that where he gives evidence to establish the private prescriptive right of another, his evidence may be received.

21. HAWKE v. BACON. M. T. 1809 C. P. 2 Taunt. 156.

In a plea to trespass for breaking, &c. the plaintiff's close, and pulling down walls, &c. the defendant justified, stating that the *locus in quo* was, and immemorially had been, parcel of a certain waste, whereon he had a right of common for all his commonable cattle, *levant*, &c., and that the walls were wrongfully erected, and standing on the said waste, whereon, &c., and separated the *locus in quo* parcel from the residue of the said waste, whereby the defendant could not fully enjoy his right aforesaid, and therefore he entered, &c. and pulled down, &c. Replication, after denying that the *locus in quo* was parcel, as stated in the plea, and the title under which the defendant claimed, that the plaintiff's close being the same, &c. continually for 20 years and more, had been and was separated, &c.; to which the defendant rejoined; and on demurrer to another part of the pleadings the court observed, that had the defendant taken issue on the replication, he would have thrown on the plaintiff the onus of proving that every part of the *locus in quo* had been inclosed for the space of 20 years.

22. D'AYROLLES v. HOWARD. E. T. 1763. K. B. 3 Burr. 1385.

To an action of trespass for spoiling and destroying peat, filling up holes, &c. the defendant pleaded a right of common, and that, by reason of the plaintiff's digging peat, he had been injured, on which he filled up the holes. The plaintiff replied *de injuria* generally, and then desired to give in evidence that sufficient common had been left; but, as it was the wish of the parties that the merits of the case should be fully tried, it was ordered by the Court that a verdict for the defendant, which they would otherwise have sustained, should be set aside on payment of costs by the plaintiff.

6. Of the witnesses.

1. WALTON v. SHELLEY. T. T. 1786. K. B. 1 T. R. 302.

Per Buller, J. If the issue be on a right of Common, which depends on a custom pervading the whole manor, the evidence of a commoner is not admissible; because, as it depends upon a custom, the record in that action would be evidence in a subsequent action, brought by that very witness to try the same right; therefore there is good reason for not receiving his testimony in such a case. But the same reason does not hold where common is claimed by prescription, in right of a particular estate; because it does not follow if A. has a prescriptive right of common belonging to his estate, that B., who has another estate in the same manor, must have the same right; neither would the judgment for A. be evidence for B.; and yet there are cases which lay it down as a general rule, that one commoner is in no case a witness for another. See 3 T. R. 32; Bull, N. P. 283; 1 P. Wms. 288; 2 Vern. 699; 2 Atk. 615.

* So in order to nullify a plea of common of vicinago, proof is needful that the lord of either waste has entirely inclosed some part, however small; for it has been seen, that if there be the least avenue for egress and regress, whereby the cattle may mutually escape, the common of vicinago continues; 3 Keb. 24; 13 East, 348.

† So owners of common fields may show a custom to inclose, which may be done by the production of old deeds, and the testimony of aged witnesses; see 2 Wills, 269. The lord may show a long custom to erect houses on the waste in exclusion of the commoners; 5 T. R. 417. Counterparts of old leases from the muniments of a manor, showing that part of the waste has been demised by the lord, although unaccompanied by proof of enjoyment, will be evidence to establish a custom for the owners of moss dales to hold them in severalty after they have been entirely cleared of turves by the tenants of the manor; 5 T. R. 412. n. Allotments under inclosure acts may also be in evidence, both at the instance of lords and commoners; see *post*, tit. Inclosure.

‡ It may perhaps, be said, that if he were allowed to be a witness, he could not afterwards use the verdict; for on the trial of his own cause, if it should appear that he was a

2. REEVES v. SYMONDS. H. T. 1715. K. B. 10 Mod. 291.

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Per Parker, C. J. If an action be brought by a commoner for his right of common, shall another person that claims a right of common upon the same title be allowed to give evidence? No; and yet it is certain that he can neither get nor lose in that cause; for the event of that cause will no way determine his right. But though he is not interested in that cause, he is interested in the question upon which the cause depends, and that will be a bias upon his mind. It is not his swearing the thing to be true that gives him any advantage; but it is the thing being true; and the law does judge that it is not proper to admit a man to swear that to be true which it is plainly his interest should be true.

3. HARVEY v. COLLISON. Norfolk Summer Ass. 1727. MSS. 1 Sel. N. P. 439. 6th ed. Although such contrary opinion was but for a short period attended to.

In replevin, defendant avowed taking the cattle damage feasant; plaintiff prescribed for common in the *locus in quo*, as appendant to his messuage. The plaintiff produced as a witness a person who claimed common in the same place. His testimony being objected to, Raymond, C. J. overruled the objection, that where a person prescribes for common not as appendant to his messuage, but by virtue of a custom within a parish or manor, and the custom is in issue, there a person within a manor or parish claiming common is interested, and cannot be a witness; but where a person prescribes for common, for all cattle *levant et couchant* on his messuage, as belonging to that messuage, there is nothing but that person's particular right of common in question, as belonging to that particular messuage; and another person who claims common in the same place by virtue of another messuage, may be a witness, because not interested in the present question.†

4. ANSCOMB v. SHORE. E. T. 1803. C. P. 1 Taunt. 261; S. C. 1 Camb. 285.

S. P. HOCKLEY v. LAMB. Lent Assizes. 1697. 1 Ld Raym. 731. S. P. [661]

KENNETT v. FOSTER. MSS. Sel. N. P. 440. 6th ed.

The declaration in this case stated a right of common in the plaintiff by prescription, and declared that the onus lay on the defendant to repair the fences of his close adjoining the common; and alleged that in consequence of his suffering them to be ruinous, the plaintiff's cattle had strayed into the said close, whereby the plaintiff had lost the use of them. In order to show the defendant's liability to repair, several inhabitants were called, when their evidence was rejected by the defendant's counsel on account of their interest in the event of establishing the plaintiff's case. The plaintiff was nonsuited; and, on a rule nisi for a new trial, it was holden that the witnesses produced were clearly incompetent, as if the plaintiff succeeded, all his fellow commoners would be relieved from the burden of repairing, or keeping proper persons to prevent infraction of the bounds of the common.—Rule discharged. See 12 Vin. Abr. 14.

5. BURTON v. HINDE. E. T. 1793. K. B. 5 T. R. 174.

In an action of trespass, where the question was, whether a corporation who had inclosed part of a common, and leased it, with a reservation of rent to themselves, had left a sufficiency for the commoners, a freeman of the corporation was called to prove the affirmative; but Gould, J. rejected him, and witness in the former suit, to admit the verdict as evidence for him would be in effect allowing a party to give evidence for himself. The answer to this objection seems to be, that the fact of his having given evidence in the former case would probably be unknown at the time of the second suit; and even if that fact should be fully proved, yet it would be presumed that he was disinterested, and then the verdict might, perhaps, be evidence for him upon the same principle which allows the depositions of a witness in a suit in equity to be evidence for him on a bill of revivor brought by the witness himself.

† Mr. Selwyn, in his Treatise on the Law of Nisi Prius, p. 440. says, that it would appear from the above case, that the witness was called to establish a right of common in the party by whom he was called; the effect of which would be to narrow and abridge the witness's right; but in a case (Kennett v. Foster, *post*, 661.) where the witness was called by the plaintiff to show that the defendant had no right, the learned judge rejected his testimony, on the ground that he was interested in the question, inasmuch as negating the defendant's right would go to enlarge the witness's right.

It is almost admitted; but, because the plaintiff had traversed a matter of law in his surrejoinder, the defendant had leave given to amend.

24. SMITH V. BAYNARD. M. T. 1673. K. B. 3 Keb. 388.

In this case, which was an action of replevin, the defendant avowed damage feasant. The plaintiff replied that the *locus in quo* adjoined to the common to which the plaintiff's ground was contiguous, affirming that the waste had never been separated by any inclosure or fence sufficient to prevent the escape of cattle from one common into the other. He then averred that the cattle accustomed to use these commons had always mixed together of their own accord, and set forth that the place where his own right existed was the freehold of A. B.; that his cattle were put there by A. B.'s licence, and that (the commons still adjoining to each other, the cattle, without his knowledge, strayed into the other common, in which, &c., and then justified the trespass complained of. The Court held that the replication was sufficient, without saying that he and all those, &c. and this not being an interest, but an excuse for a trespass, the cattle need not be said to be *levant et couchant*, for the court will not intend them to be strangers.

25. GULLETT V. LOPES. H. T. 1811. 13 East, 348.

In this case it became a question whether a right of common of vicinage existed under the following circumstances. It appeared that immemorially, and until the inclosure hereinafter mentioned, commons A. and B. adjoined each other without any separation by a fence on the side of common B. towards the north and east; and that, until such inclosure, the cattle of the commoners wandered, by reason of vicinage, into the other; and that the inclosure made on one of the common was done in such a manner as to leave open only a passage sufficient for the highway which led over the one to the other. The Court held that without a complete inclosure and separation, the cattle might still stray from the one common to the other without impediment, and that the common by vicinage was not excluded.

26. MOSSE V. BENNET. H. T. 1724. K. B. 8 Mod. 120.

Trespass for enclosing three acres of common with hurdles, and covering three more. Plea, prescribing to have a fair on the common, and that the hurdles were used to keep and inclose cattle there, and so justifying inclosing three acres, and covering three acres; but the Court held that the plaintiff's complaint of a disturbance in six acres had not been answered, as the plea had omitted to state that the last were different acres from the first. See 1 Keb. 391. 453; 1 Sid. 106; 3 Burr. 1385; Com. Rep. 341.

other pleas of justification; for instance, the right should be amply stated, so as to answer the whole declaration.

27. EARL MANCHESTER V. VALE. M. T. 1666. K. B. 1 Saund. 27.

Trespass. The defendant pleaded seisin in fee in A., and that A. appointed the defendant to take care of his cattle put into the close in which, &c. and then said that A. caused divers of his commonable cattle to be put into the close in question; whereupon the defendant, as his servant, entered to take care of them; but as he neither said that the cattle were his own, nor that he had put them on the *locus in quo*, and consequently that he could not be guilty of the trespass; the Court considered that the plea was bad.

28. MELLOR V. WALKER. H. T. 1669. K. B. 2 Saund.

This was an action of trespass, which was alleged in the declaration to have happened on the 1st of April, and the defendant justified on the first of August. The Court intimated, on overruling a general demurrer, that had it been special, they would have supported it. See 2 Ro. Abr. 676; S C. 1 Vent. 92.

strictly followed in the plea, if it be intended to justify the same trespass.

29. STEVENS V. WHISTER. E. T. 1809. K. B. 11 East, 51.

Declaration in trespass. The defendant pleaded not guilty. It appeared that the plaintiff had lands on one side of a certain lane, by which he became entitled to the soil and freehold of half the lane opposite to his inclosures, and that the defendant depastured his cattle along that lane, which cattle had tres-

passed on one of the plaintiff's inclosures. It was urged that these facts would not justify him in declaring for a trespass in the lane generally, as if he claimed an exclusive right to the whole. But the Court said the plaintiff had an exclusive right to part of the lane, and if the defendant meant to drive him to confine the trespass complained of upon the face of his declaration to that part of the lane which was his, he should have pleaded soil and freehold in another, which would have obliged the plaintiff to new assign.
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30. PRATT v. GOONME, H. T. 1812. K. B. 15 East, 235.

In trespass *quare clausum fregit*, the defendant pleaded the general issue, and also a special justification that the *locus in quo* was part of a certain common field which was then allotted to him by the leet jury of the manor; the plaintiff replied to the special plea, after setting out the abutments of the closes trespassed upon, that the closes newly assigned were different from the defendant's allotment. The defendant pleaded not guilty to this new assignment; and it happening that the plaintiff could not prove a trespass any where, except on that spot allotted to the defendant by the leet jury, the judge directed a verdict for the plaintiff, on the general issue, and for the defendant, on the plea of not guilty to the new assignment: and on a rule to show cause why the verdict should not be entered generally for the plaintiff, the Court upheld the judge's opinion, saying, that not guilty to the new assignment put the whole of it in issue. The plaintiff, however, had leave to amend.

31. COCKEREL v. ARMSTRONG. T. T. 1738. C. P. Willes, 101; S. C. 7 Mod. 247; Com. Rep. 582.

Trespass was brought for taking a horse. The defendants pleaded soil and freehold in the *locus in quo* in other persons, and justified as their servants, and by their command, taking the horse damage feasant. The plaintiff pleaded *de injuria*; on which there was a demurrer, showing for cause that the plaintiff had not traversed; and judgment was given for the defendants on the grounds above stated.

32. It will appear, that where the right of common or way, as stated by the defendant, is denied by the plaintiff, it is in general sufficient merely to deny such right, following the language of the plea, and concluding to the country. This rule has been most ably deduced from the cases in the books by Mr. Sergeant Williams: 1 Saund. 103. b; where he states, that courts of justice disallow unnecessary prolixities in pleading, because they tend to expense and delay, and that, therefore, where a defendant cannot take any new or other issue in his rejoinder than the matter he had pleaded before, without a departure from his plea, or where the issue on the rejoinder would be the same in substance as on the plea, that the plaintiff ought to conclude to the country; as where the plea states a defect of fences, a prescription for a right of common or way, &c. in which the better and shorter method is directly to deny the fact of defect of fences, prescription, and the like, without a formal traverse, and conclude to the country; 1 Saund. 103. b; 1 Ld. Raym. 641.

33. GERRISH v. RODBURNE. H. T. 1771. C. P. 3 Wils. 165.

* The matter new assigned must be consistent with the declaration, and not varying from, or more extensive than, the trespasses therein enumerated; Vin. Ab. Trespass, Win. 65; 4 Leon. 15, 16; 10 East, 79. 81; or those which the defendant has in his plea professed to answer; for a new assignment is merely to avoid the effect of the plea, which can only operate upon the trespasses thereby omitted; 10 East, 80. It should also only be of material matter, and therefore if the plea set up a right of way or common, &c. at all times of the year, the new assignment should not be that the defendant "at other times, &c." time in that case being immaterial; and in an action of trespass against several, if some of the defendants suffer judgment by default, and the others plead a justification, the new assignment should be as to all the defendants, and not merely to those who have pleaded, for that would be a departure; 2 Leon. 199; Com. Dig. Pleader, F. 11; and as the plaintiff avers that the trespasses new assigned are other and different to those mentioned in the plea, he waives or abandons the trespasses which the defendant has justified, and it is not necessary to plead over again to the new assignment any matter of justification necessarily covered by the plea; as if common of pasture at all times of the year be pleaded, and the plaintiff new assigns that the defendant entered at other times; Gouldsb. 191; Moore, 540; Cro. Eliz. 590; S. C. Moore, 460; Jenk. 6th Cent. 265.

For altho' a right of common may exist in the manor, it may be restricted in various particulars;

Or show such grounds as will establish a ground for the plaintiff's complaint.*

Or that the cattle were the defendant's own commonable cattle *levant et couchant* [648]

But the existence of the privilege has been sometimes traversed;

And under certain circumstances is generally adopted, as where it is intended to set up another prescription,

Inconsistent with the one relied on;

In which case it is necessary that the whole

Replevin Cognizance. A by-law was set out, which ordained that no person or persons should depasture any sheep, horses, &c. at a certain time, on a common therein mentioned, on pain of forfeiting 20s. for every sheep, &c. which should be depastured there contrary to the said by-laws. The Court asked how they could judge if the offence set forth was contrary to all former by-laws, when they were not put on the record? and they strongly inclined against the defendant, who had pleaded this by-law in excuse for detaining cattle; but the case was adjourned, and was not mentioned again.

34. **MILES v. ETTRIDGE.** E. T. 4 W. 3 K. B. 1 Show. 350.

Trespass for throwing down fences; justification for common pleaded. Replication, of licence from the defendant's father to make and continue the inclosure in question. But the Court held that the licence as pleaded was bad, because such licence determined on his father's death.

35. **ROBINSON v. RALEY.** E. T. 1757. K. B. 1 Burr. 320.

Trespass, for depasturing plaintiff's grounds with cattle. Plea, justifying under a right of common. Replication traversing such right; and, to one plea, traversing that the cattle were defendant's own, and that they were *levant et couchant* on the premises. The Court, in deciding a point that arose on these pleadings, *inter alia*, said: the replication *de injuria sua propria absque tali causa* will do in all cases where matter of title, and other things of that kind are not included in the *absque tali causa*; and if you admit them, you may then plead *de injuria sua propria absque residuo causæ*, traversing that residue. *couchant* on the premises, concluding to the country and not with a formal traverse.†

36. **HICKMAN v. THORNE.** T. T. 1676. C. P. 2 Mod. 104.

In replevin the defendant justified for damage feasant; the plaintiff prescribed for common in the *locus in quo*. The defendant then alleged a custom that every freeholder might inclose in the common field against the rest; and on demurrer, for want of traversing the plaintiff's prescription, the Court held, that the custom ought first to have been pleaded, and then the prescription traversed. See 49 E. 3. 19; Bro. Trav. Pl. 42. & 169; 14 H. 6. 6; 1 Leon.

43.

37. **ROBINSON v. RALEY.** E. T. 1757. K. B. 1 Burr. 316.

A defendant prescribed to have reasonable estovers; and the plaintiff replied that the *locus in quo* was within a forest, and that the defendant's prescription to have estovers depended on the liberty of the forest. On an objection taken to the replication, the Court held that it was bad, for either the law of the forest should have been pleaded, or the defendant's prescription traversed. See 2 Mod. 104.

38. **KINCHIN v. KNIGHT.** M. T. 1749. K. B. 1 Bl. 49.

Trespass was brought for rooting up the plaintiff's soil with hogs. The defendant pleaded a right of common for hogs. The plaintiff admitted the right in his replication, but said that the hogs ought to have been rung, on which defendant demurred, saying that the first custom should have been traversed; but the Court held the replication good, on the ground, that the two prescriptions were not inconsistent with each other.

39. **MOSWOOD v. WOOD.** H. T. 1791. 4 T. R. 157.

To an action of trespass in the common, called Swanwick common, the defendant pleaded that Swanwick and Swanwick Green commons lay open to

* It is agreed that such a licence should be pleaded to have been made by deed, and that the omission so to state it is helped after verdict by the stat. of feofails; Cro. Jac. 574. Monk v. Butler; 2 Saund. 320. Hoskins v. Robins; Sir Thomas Raymond, 171. Ramsey v. Rawson; 1 Ventr. 25. S. C. It was, indeed, argued in one case, that a parol licence would be sufficient where the licence was for one putting in of cattle, because no estate passed, but it may be suggested, that such a reason would not now avail, since under a general licence no estate passes, 1 Ventr. 25; Ramsey v. Brown, but see Freem. Rep. 190, which seems to bear out this position.

† Though it is said that in the latter case, where the defendant has turned on his own commonable cattle, as well as other cattle, the plaintiff should new assign, stating that he brought his action for the depasturing the common with other cattle, and ought not to traverse the levancy and couchancy; 1 Saund. 346. a. The plaintiff may also reply an improvement, *ibid*.

each other, and prescribed for a right in both commons. Replication, traversing the prescriptions in Swanwick common, dropping Swanwick Green. Rejoinder, tendering issue on the prescription both in Swanwick common and Swanwick Green. Special demurrer, because the defendants, in their rejoinder, did not tender an issue on the fact traversed by the plaintiff in his replication, and because the issue tendered in the rejoinder is too large, comprehending not only the fact of the prescription traversed by the replication, but also a matter of fact not alleged nor traversed by the replication, and because the last prescription, so attempted to be put in issue, is wholly immaterial and irrelevant in this action, &c. Joinder in demurrer. *Per Cur.* All prescriptions are in their nature entire; and when they are pleaded, the adverse party cannot deny a part only, but must either demur or traverse the whole; but though a person plead a prescription in a more extensive manner than he need do, he must prove it as laid; and in that respect, he subjects himself to some disadvantage in thus pleading it. Then it is but just, on the other hand, that he should be entitled to any advantage which he can derive from the prescription which he pleads. Suppose, in this case, that the defendant can give some evidence of acts of ownership in Swanwick Delves, but much stronger evidence in Swanwick Green, he ought to have an opportunity of giving the latter in evidence, having first introduced a connection between both, which he could not be permitted to do if the prescription were confined to the former part only. If, indeed, the jury could separate the parts of the prescription in giving their verdict, then the plaintiff might sustain a disadvantage from the defendants pleading their general prescription with regard to the costs of that part introduced by the defendant in his own favour; but the jury must give a general verdict for the whole prescription one way or the other. The Court, however, gave the plaintiff leave to amend.

40. GRIFFITH V. WILLIAMS. M. T. 1752. K. B. 1 Wils. 339.

Trespass. Defendant justified under a prescriptive right to a duty called tressary, and to the like right to distrain for it. The plaintiffs traversed the right to the duty without traversing the right to distrain. Some exceptions were taken to the plea, and the custom; but as the whole court were of opinion that the traverse was well enough, they determined nothing concerning the plea, but seemed to think that such a custom could not be supported. Denison, J. said: suppose a man claims a right to common *pur cause de vicinage* in A. and B., it was never doubted but a traversal of the right in A. would be sufficient without traversing his right in B. Judgment for the plaintiff.

41. MELLOR V. WALKER. H. T. 1669. K. B. 2 Saund. 1; S. C. 2 Keb. 676; S. C. 1 Vent. 92.

The defendant, by virtue of a right of common, justified entering a certain close at a particular time, to wit, when a certain field was sown with any kind of corn, without this, that he was guilty of any trespass at any time after the said field was so sown with corn; and though, indeed, the Court thought, on demurrer, that the traverse had sufficiently answered the material part of the declaration, yet it seems that, at this day, such a plea would be holden badly on special demurrer, because of the addition of a traverse after a justification, which in itself would be a legal bar to the action.

42. MAYOR OF OXFORD V. RICHARDSON. T. T. 1793. Ex. Ch. 2 H. Bl. 182; S. C. 1 Anstr. 231. reversing S. C. 4 T. R. 437. S. P. PALMER V. STONE. T. T. 1759. K. B. 2 Wils. 96. [650]

In an action of trespass for fishing in the plaintiff's fishery, the defendant pleaded that the *locus in quo* was an arm of the sea, in which every subject of the realm had the liberty and privilege of free fishing. The plaintiff replied

* And it is material to traverse particular facts connected with the title to the common claimed, and without which the right cannot be substantiated, as the levancy and couchancy of cattle; 2 Show. 328; because the application of estovers; *ibid.* as necessary for repairing for example; 7 H. 6. 38: see 2 Leon. 209. &c.

† In framing pleas in bar in replevin, to avowries damage feasant the same rules must be adopted as have been just pointed out relative to the pleas to an action of trespass, whether they go to show plaintiff's right of common, or to negative defendant's privilege;

Rejoinder should be traversed.* [649]

It need not, however, be so in express terms, if from the nature of the common it appear that the averments are tantamount to a direct traverse,

And a traverse should not be adopted after a sufficient confession and avoidance. Nor made use of to negative an inference of law.†

the common. But the Court held the form of action correct. See Cro. Eliz. 434.

A common 3. **ASHMEAD v. RANGER.** T. T. 1699. 2 Salk. 638; S. C. 11 Mod. 18; S. C. 12 id. 380; S. C. Ca. Temp. Holt, 162; S. C. Fort. 152.

er having
no owner
ship in the
soil,

Trespass was brought by lessee of a copyhold for life, for breaking his close, and cutting down his trees. The defendant justified as servant to the Earl of Kent, lord of the manor. The plaintiff replied that the copyholder was tenant for life, his house in decay, and that the trees growing on the land were not sufficient to repair, &c. Upon demurrer, Holt, C. J. held, that the copyholder was tenant of the trees as much as of the land; that the fruit and the acorns belonged to the tenant; and he held, that if H. has all the thorns in such a place for estovers, he may maintain trespass against any one that cuts them, even his grantor, and in such case need not aver that he burnt them; but where H. hath only estovers to be taken in such a wood or place, and the grantor cuts the whole, the grantee may maintain case against the grantor, but not trespass *ri et arnis*; and the whole Court held the action was well maintained by the possessory right which the plaintiff had. The judgment was affirmed in Cam. Scacc, but reversed in the House of Lords; for the tenant could not cut the trees; and if the lord could not, they must rot on the land; for then nobody could.

4. **FAWCETT v. STRICKLAND.** H. T. 1737. C. P. Willes, 61.

Should any
disturbance
be commit-
ted by the
lord, a com-
moner may
bring an ac-
tion on the
case against
him; as if,
for instance
he enclose,
and thereby
affect the
right of
common;*

In this case Willes, C. J. in deciding a case in which it was held that the lord of a manor may enclose part of a common against tenants having common of pasture, notwithstanding they have also a common of turbary, if he leave sufficient common of pasture, said: if indeed by such inclosure their respective rights of common were affected, or they were interrupted in the enjoyment of either of these rights, they might certainly bring their action, and the lord (to be sure) in such case could not justify such inclosure in prejudice of those rights. But by his present action the plaintiff does not complain of any such interruption, nor does he insist upon any such matter upon the face of his pleadings. As, therefore, his only complaint is of an interruption of his common of pasture, and as by the statute of Merton the defendant might certainly inclose part of the common, notwithstanding the plaintiff's common of pasture, if he has left sufficient common of pasture, which in the present case is admitted by the pleadings; we are of opinion that the right of common of turbary, insisted upon by the plaintiff, is no bar against the defendant's inclosure.

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5. **HOWARD v. SPENCER.** E. T. 1665. K. B. 1 Keb. 884.

Or if he
erects build-
ings, fences
or hedges,
to the pre-
judice of
the com-
moner's
right;† or
obstructs
the way to
the waste;‡
or digs pits
or trenches.

Trespass against defendant as a commoner. Defendant justified filling up trenches made by the lord. To this the plaintiff demurred; and the Court said, that an action upon the case ought to have been brought by defendant for any injury he sustained by the lord's conduct, and that he ought not to have interfered as he had done. See 2 H. 4. 11; 11 H. 4. 25. 26; Bro. Com. pl. 32; Noy. 37; Cro. Eliz. 198. 865; Godb. 126.

* If in approving under the stat. of Merton, the lord omits to leave sufficient common for his tenants, those who are freeholders may have an assize by virtue of that statute, or the way to an action; and copyholders may bring trespass on the case. But it is said that a writ of admeasurement does not lie on such occasions; F. N. B. 125.

† It is said that where the lord makes a hedge or other erection upon the common, the commoner may abate the whole; but where it is made upon other land, which is no part of the common, but surrounds the common, he can only abate so much of the erection as to make a way for his cattle to go into the common; 15 H. 7. 10. 6. pl. 28; 29 Edw. 3. 6; 2 Inst. 88; 2 Mod. 65. It may be mentioned, that the writ of *curia claudenda* (which, it has been seen, when examining the remedies, the lord when injured may resort to is a writ to compel another to make a fence or wall between his land and the plaintiff's, on his refusing or deferring to do it,) does not apply to commoners, because it lies not but for him who has the freehold; Reg. Orig. 155; F. N. B. 128.

‡ The commoner has it also in his power to abate such nuisances; 15 H. 7. 10. Bro. Com. pl. 9; 29 E. 3. 6; 2 Mod. 65. If, therefore, the lord approve without leaving sufficient common, the commoner may break down the inclosure; 2 Inst. 88.

6. HASSARD v. CANTRELL. H. T. 1694. C. P. 1 Lutw. 38; S. C. COOPER v. MARSHALL. 1 Burr. 259; S. C. 2 Wils. 51; S. P. TIMBERLEY v. GROBHAM AND HOW. Sir T. Jones. 5.

This was an action for disturbance of common. The declaration set forth that certain parties were seised in fee of a messuage, &c. in A., and alleged a prescription in all of them to have common of pasture, &c. upon certain waste ground; that a demise was made of the messuage to the plaintiff at will; that the defendant erected a warren, &c. The defendant pleaded that he was seised in fee of the manor of which the common was parcel; that from time whereof, &c. the defendant had a free warren in the said manor, and therefore justified the making of coney burrows, &c. and averred that the plaintiff had sufficiency of common. The plaintiff, *inter alia*, protested that he had not sufficiency of common; the objection was taken that the sufficiency of common was not traversable; but the Court were of a contrary opinion, and judgment was given accordingly. See Palm. 319; 2 Bulst. 115.

7. MASON v. CESAR. H. T. 1674. C. P. 2 Mod. 65.

Trespass for pulling down of hedges. The defendant pleaded that he had right of common in the place where, &c. and that the hedges were made upon his common, so that he could not in *ex parte* enjoy his common in *tam amplo modo*, &c. and so justified. Verdict for plaintiff. Motion in arrest of judgment, on the ground that the plea was ill and the issue frivolous; for it was impossible that he should have common where the hedges were, and therefore the defendant ought to have brought an action upon the case, or a *quod permittat*; and it was urged that he could not abate the hedges, though he might have pulled down so much as might have opened a way to his common; that the lord had an interest in his soil, and that a commoner had no authority to do any thing but to enter and put in his beasts, and not to throw down quick-set hedges, for that was a shelter to his beasts. But the Court were of opinion that the defendant might abate the hedges, for thereby he did not meddle with the soil, but only pulled down the erection.†

8. KIRBY v. SADGROVE. M. T. K. B. 6 T. R. 483; S. C. affirmed in Exch. C. 1 B. & P. 13; S. C. 3 Anst. 892.

To trespass for cutting down trees, the defendant pleaded that the trees grew in a certain common where the defendant had right of common for his sheep, because the said trees had been wrongfully planted and were wrongfully growing upon the said common, incumbering the same, &c. so that the defendant could not, without cutting down the same, enjoy his common of pas-

* The commoner cannot, however, fill up these trenches or pits; 1 Keb. 884; 1 Brownl. 228; or kill the coney, or fill up their burrows; 2 Leon. 201; 4 id. 7; Cro. Eliz. 876; Ow. 114; Cro. Jac. 195. 229; Yelv. 106. 163; 1 Brownl. 208; 2 Bulst. 115. 227; Sir T. Jones, 5; 1 Lutw. 107; 1 Burr. 259; 2 Wils. 51. However, all these authorities only go the length of forbidding the commoner to destroy the lord's coney, for he cannot maintain an action on the case for injuries done to his common by rabbits bred on a neighbour's soil, since he may destroy them damage feasant. Cro. Eliz. 547; 5 Rep. 104; Cro. Car. 387.

† Such as surcharging it with his own beasts, or those of others with his licence; F. N. B. 125; Sty. 164. It has been held, that the owner of the soil who detains the profits forcibly from a person having a right of common, cannot be committed by a justice on view, under 45 Ric. c. 2. for a forcible detention, since a disseisin of common is inquirable at the assize, and the statute extends only to cases *ubi ingressus non datur per legem*, whereas one may enter lawfully into his own land; Cro. Car. 486.

‡ An information was moved for against copyholders for a riot, in pulling down inclosures, though there were sufficient gaps for them; and the Court strongly reprobated the using force; and on the commoners' neglect to try their right at law, the information was granted; 2 Mod. 66. It is, however, worthy of observation, that as the lord may approve, leaving a sufficiency of common, the commoner acts in all these cases at the peril of being punished in an action of trespass, provided the lord hath not interfered with the rights and privileges of those entitled to depasture the common to such an extent as not to leave them an opportunity of feeding their cattle thereon.

§ The interest, indeed, which a commoner has in the common is, in the legal phrase, to eat the grass with the mouths of their cattle; he must not meddle at all with the soil, nor with its fruit and produce, even though it may eventually improve and enliven the common; 1 Roll. Abr. 406. pl. 10; 12 H. 8. 2. a. Therefore he cannot cut the grass, bushes,

[670] ture, therefore he cut down the trees, &c. The plaintiff replied, that the common was parcel of the manors of S. and B., and that the plaintiff was lord of the manors, and that he planted the trees, &c. Demurrer thereto, and joinder in demurrer. The questions before the Court were, first. Whether the lord had a right to plant trees on the waste, notwithstanding a right of common in others? and, 2d. Supposing he had no such right, the commoner could justify cutting them down.

Per Cur. The justification set up by the commoner cannot be supported; for if the lord of a manor make a hedge round the common, or do any other act that entirely excludes the commoner from exercising his right, the latter may do whatever is necessary to let himself into the common; but if the commoners right be merely abridged by the act of the lord, his remedy is by an action on the case, or by an assize, and he cannot assert his right by any act of his own. As the lord of a manor may do any act on the common, provided he do not contravene the rights of the commoners, therefore *prima facie* he has a right to plant trees there. By the statute of Merton, 20 Hen. 3. c. 4 he may approve against his commoners, having sufficiency of common, and such an act does not seem *prima facie* to contravene the rights of the commoners. If he may inclose, *a fortiori* he may plant trees on the common; but if he do either of those acts to excess, and do not leave a sufficiency, the commoners may bring an action against him. But in order to maintain such an action against the lord, the commoner must show that there is not a sufficiency of common left; as it will be taken for granted that the lord may plant trees, until the commoner shows that such planting prevents his enjoying his right of common in so ample and beneficial a manner as he is entitled to. In this case, though the trees were standing on the common, there was some common left; and if a commoner complain that there is not a sufficiency of common left, it is not reasonable that he should cut down the trees. He ought to bring his action against the lord for abridging his right.—Judgment for plaintiff.

9. COOPER V. MARSHALL. E. T. 1757. K. B. 1 Burr. 259; S. C. 2 Kenyon. 1.

Upon the principle that policy dictates the rare exercise of such a privilege, and only sanctions it where the acts committed are entirely in consistent with the nature of the common.*

In an action of trespass for breaking, entering, and digging up the plaintiff's close, and filling up and spoiling the coney-burrows there, &c. the plaintiff laid a second count in his declaration for doing the like in his free warren. The defendant pleaded a justification under a right of common in 20 acres, &c. and that the coney-burrows were wrongfully, &c. now erected and kept up, whereby the said common was surcharged and spoiled, so that he could not enjoy sufficient common in the said 20 acres, as of right he ought; therefore he justified, &c. The plaintiff demurred. and the defendant joined in demurrer; and the Court said: the lord, by his right of common, gives every thing incident to the enjoyment of it (as ingress, egress, &c.) and thereby authorises the commoner to remove every obstruction to his cattle grazing the grass which fern, or other thing growing on the common, nor can he cut the mole-holes, or make fish ponds there; 12 H. 8. 2 a; 2 Leon. 202; Godb. 182. pl. 258; Anon, Bridg. 10. It is said in 1 Brownl. 228. that if the common be full of mole-hills, a commoner may dig them down; and if the lord make a pond in the common, a commoner may dig and let the water out; but this seems contrary to the authorities; see 1 Sid. 251; 6 T. R. 483. It has been held that, if the lord sells trees, so that the commoner is deprived of his stovers, because the vendee has felled trees, an action on the case may be maintained against the original owner of them; for common and loppings are incident to the copyhold, but the commoner could not himself remedy the wrong; 1 Brownl. 231; 8 Rep. 63. So it was held, that if one had a common of estover in the woods of another, and he cut part or all of the wood, he could not take any part of that which was cut, but should be put to his assize or case, according to the quantity of his estate; 1 Ro. Ab. The same doctrine prevails between the grantee of estovers and his grantor; so that if the grantor should cut away all the wood from which he has made a grant of estovers, the only remedy is by assize or action; Cro. Eliz. 820. And the reason of these decisions is. that whatever interest the tenant of the soil may have in the profits before they are severed from the land, the moment the severance takes place his interest ceases, for he never had a property in them. But it seems that the commoner may eat the corn wrongfully sown, for the wrong begins first from the tenant; Noy. Rep. 37; Cro. Eliz. S. C.

* The abator is besides a judge in his own cause, which ought seldom to be permitted; whereas an action will best ascertain the just measure of the damages he has sustained.

grows on such a spot of ground, because every such obstruction is directly contrary to the terms of the grant. But in the present case, the lord has done nothing contrary to the grant. He has not obstructed the commoner from entering and putting in his cattle. So the lord has a right to put conies on the common; the conies themselves naturally make the burrows, so that they are incident to the right of putting on the conies. But again, if the lord surtents and charges, the commoner is injured in his right of common; but his remedy is not to abate; not to be his own judge in the matter. There is a certain line to be drawn; the lord has a right so far, and no farther. The consumer cannot destroy or drive off the conies, nor destroy the burrows. It being a free warren does not alter the case. We are, therefore, clearly of opinion, that judgment must be given for plaintiff.*

10. WAGSTAFF V. RIDER. E. T. 1721. C. P. Com. Rep. 341.

An action on the case was brought, wherein the plaintiff declared that he was possessed of a messuage, and had common in a certain field called Buryfield, paying so much, and that the defendants were owners of another field called Pitwell Field, and had always repaired the fences between the two fields, but that they had suffered the inclosures to decay to the damage of the plaintiff. The defendant pleaded insufficiently; and on demurrer to their plea they abandoned it, and excepted to the declaration; first, on the ground that there was no prescription, and that a prescription was necessary in order to compel these repairs; and next, admitting the existence of a prescription, that a commoner could not have a right of action in this case, since the ownership of the soil was in another person.—Judgment was given for defendant.

11. BROMHALL V. NORTON. E. T. 1681. K. B. Sir T. Jones, 193. S. P. RACKHAM V. JESUP. M. T. 1772. C. P. 3 Wils. 332.

Trespass for burning the plaintiff's turves. The defendant justified, that the turves were on land where he had common (and showed title to it,) and that for damage feasant he burnt the turves. The plaintiff therefore demurred, and had judgment; as the defendant had no right to interfere with the soil.

12. WOODSON V. NEWTON. T. T. 1726. K. B. Str. 777..

Trespass for taking and dispersing a load of fern ashes. The defendant pleaded that he was an occupier of land in A., the tenants whereof had right of common and cutting fern on the *locus in quo*; and that the plaintiff wrongfully came and out fern and burnt it, whereupon the defendant came and scattered it about, *prout ei bene licuit* Demurrer *inde*. The counsel for defendant cited 1 Roll. Abr. 405. pl. 5. that a commoner may justify taking the cattle of a stranger damage feasant or may abate hedges. The Court in giving judgment said; if the plaintiff did him any damage, he has his action; but after the plaintiff had burnt the fern, and thereby converted it to his own use, the commoner had no right to come and disperse it. Judgment for plaintiff. See 9 Co. 1126; 2 Mod. 65; Lutw. 1240; Str. 428.

lity to personally interfere with the removal of the causes of such disturbances, except as has been already pointed out.

3. Of the parties to the action.

Commoners may sue, or defend an action, at their common charge; Hob. 91.

4. Of the pleadings.†

1. NEWMAN V. HOLDMYFAST. H. T. 1716. K. B. 1 Str. 54.

This was an action of ejectment for lands, and also for common of pasture. The omission of the mention of the nature of the common was allowed by the Court to pass unnoticed, a verdict having been recorded for the plaintiff, as they would intend at such stage of the proceeding that the nature of the common was of such a description as would have authorised the bringing of an action of the nature of the plea.

* Much less can a commoner kill the rabbits to prevent their increase to the prejudice of the common; 1 Roll. Abr. 405. pl. 1. 2; Hodson v. Grissell; S. C. Cro. Jac. 196; Yelv. 104; S. C. cited 1 Lutw. 108; 2 Leon. 208.

† As to the venue, *vide ante*.

‡ For forms, see Petersdorff's Index, Civil Div. tit. Common.

Commoners may sue &c. jointly.

The nature of the plea depends on the form of action;† should ejectment be brought

the declaration for ejectment, and which was the same sum and been proved at the trial. *See Freeman v. Freeman*.

Although the Court was not called upon to decide whether a right of common appurtenant was recoverable in this form of action, it was proved at the trial as well as on the particular description of it given in the pleadings.

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When, therefore, ejectment was brought for lands and

so where an ejectment was brought for a beast-gate.

In the more common action, viz. an action upon the case, it may be premised that in the formation of the pleadings,

Formerly† the declaration went on to state the plaintiff's seisin in fee; but this is now unnecessary, it having been long settled that no title to the common, either by prescription or otherwise, need be set out; but if set forth,

an acknowledgment with the general plea of statute was sufficient. It may be, however, insisted that a more precise statement of the declaration is to be recovered.

See M. T. 1775. K. B. Ca. Temp. Hard. 167.

Ejectment for a right of common appurtenant was recoverable in this form of action. A verdict and judgment was rendered in the plaintiff's favor. An exception was taken to the verdict, that an ejectment did not lie for cattle-gates without pasture. But Lord Hardwicke, C. J. said: cattle-gates in this respect are as much a right of common as any other right of common, and it must either be a right of common for cattle, or it must be a right of common for cattle and according to very many cases, such is the nature of pasture-right, after verdict it is understood to mean common appurtenant, and for that too an ejectment will lie.

3. *Baton v. H. T. 1775. K. B. 3 Keb. 738. Baker v. Rok. T. T. 1773. K. B. Ca. Temp. Hard. 127.*

Ejectment of a messuage, and 40 acres of pasture. After verdict, and exception was taken, in arrest of judgment, that an ejectment did not lie for common any more than for a piscary. *See per Cur.* Although it is true that such action does not lie for an incorporeal hereditament, and therefore not for a right of common, yet the objection comes too late. A verdict has been awarded by the jury, and after that we must intend that it was appurtenant, which completely nullifies the defendant's arguments.

4. *Mellington v. God. Title. H. T. 1737. K. B. 2 Le. 184. S. C. Andr. 106.*

This was a writ of error on a judgment for the plaintiff, which had been recorded in the court below in an action of ejectment, brought for a beast-gate, which is a term known in Suffolk, where the action was brought, and imports land and common for one beast. The Court affirmed the judgment.*

5. *Stylerman v. Patrick. M. T. 1675. C. P. 2 Mod. 141.*

An action on the case was brought by the plaintiff against the defendant for eating his grass with his sheep, so that he could not in *tam amplo modo* enjoy his common. There was a verdict for the plaintiff. A motion was made in arrest of judgment, because the plaintiff set forth his right to the common only by way of recital with a *cum que etiam*, &c. that he had right to common in such a place. But the court said: it is affirmative enough. The defendant is, in the subsequent part of the declaration, charged with doing the plaintiff damage. The case cannot be assimilated to an action of trespass.

The same precision is not observed, as where the commoner justifies. In the commencement of the declaration, the usual recital, "for that whereas, &c." is therefore sufficient.

6. *Crowther v. Oldfield. H. T. 4 Hen. 2 Id. Raym. 1230; S. C. Salk. 364; S. C. 6 Mod. 19. S. P. Atkinson v. Teasdale. 3 Wils. 280. S. P. Beau v. Bloom. id. 458. S. P. Dorne v. Castifex. 3 Salk. 363; S. C. Com. Rep. 44. S. P. Strode v. Birt. 12 Mod. 97. Bound v. Brooking. Comb. 370. Com. Rep. 7; 3 Salk. 12; Skin. 621; Ca. Temp. Holt, 146; Sir T. Jon. 148; 1 Vent. 356; 11 Mod. 53; 12 id. 35; Wiles, 621. S. P. Saunders v. Williams. 1 Vent. 319; S. C. 3 Keb. 820. S. P. John v. Moody. 1 Vent. 215. Contra, Hill v. Gollap. 1 Mod. 175.*

Powell, C. J. in alluding to a defect in a commoner's title which had been long settled set out in a declaration in an action upon the case, said, that though in declarations it is not necessary to show a title, yet, if you do show a title, and show it insufficiently, it will be ill upon demurrer. But he held that it was cured by

* So in the case of *Barnes v. Peterson*, 2 Str. 1063, the Court said that ejectment had been in many cases holden to lie under similar circumstances, where the term used was known in the districts where the right was claimed, as, for instance, for *mountain* in Ireland, and for *cattlegate* in Yorkshire. And it has been seen, *ante*, p. 666, that estovers, turbary, piscary, and other commons, may be recovered in this form of action if they are appurtenant to land.

† See Co. Lit. 9. pl. 8. 9. 11: Winch. Ent. 76: Heine, 64. 207: 1 Lutw. 101: Lill. Ent. 62.

the verdict, for a defect of title in a declaration may be helped by verdict. And he put the common case, that where an assignee of a reversion brings debt for rent, and in his declaration does not show an attornment, on *nil debet* pleaded, and a verdict for the plaintiff, the defect is helped. See Cro. Eliz. 153; B. N. P. 76.

7. COWLAM V. SLACK. H. T. 1812. K. B. 15 East, 108; 3 Taunt. 24.

This was an action upon the case for disturbance of plaintiff's common, which he claimed in his declaration by reason merely of his possession of land, without stating it to be by prescription or grant. Upon a doubt being raised as to whether the averment was sufficient, the Court said that they thought no further allegation was necessary, *Le Blanc, J.* observing: may not common be claimed as *appurtenant* generally? and then, as prescription supposes an original grant, may not the right be proved either by prescription or by grant within time of memory? And though it may not have been usual to claim it in this way, I do not see why it may not be so claimed. See Cro. Eliz. 570; Dy. 365.

8. CHEESMAN V. HARDHAM. T. T. 1818. K. B. 1 B. & A. 706.

The plaintiff in this case declared that he was lawfully possessed of divers, to wit, 100 acres of land, with the appurtenances, situate in a certain common field called B., and that, by reason thereof he had common appurtenant for all his commonable cattle *levant et couchant* in and upon his said land with the appurtenances, in and over the whole of the said common field every year, when the said field was sown with any kind of grain, after the said corn in the said field was reaped, gathered, and carried away, until the said field, or some part thereof, was sown again with some kind of corn. The question which arose was whether this right of common had been correctly described in the declaration, and supported by evidence. It was objected, that as this was arable land, situate in a common field, the cattle could not be properly said to be *levant et couchant on the said land*, inasmuch as they wandered over the whole extent, and might with equal propriety be said to be *levant et couchant* on any other part of the common field. The Court said: this therefore brings it to the question, what is the meaning of the term *levancy and couchancy*, as used in this declaration with reference to a right of common? In the case of a distress, those cattle only are said to be *levant and couchant* on the land, which had been there for a space of time long enough for them to have lain down and risen up again. But in a case of a right of common it is different, for there it means cattle which are connected with the land in respect of which common is claimed, and is a mode of ascertaining the number of cattle which are entitled to the right of common. The right of common appendant is confined to arable land only, and yet the party must state, in claiming this right, that the cattle were *levant and couchant* upon the land. The right stated in this case, is not, however, properly speaking, that of common appendant, but is most like the right of common stated in Sir Miles Corbett's case, (7 Co. 65,) and there called common of shack, which is a right of persons occupying arable land lying together and unclosed to turn out their cattle to feed *promiscue* in the open field; but then the number which each man is at liberty to turn out must be limited by some rule. This introduces *levancy and couchancy*, by which the number of cattle to be turned out is restrained to that which the land of each in common is capable of supporting. In the present case each man, under these words, would be entitled to put upon the common the number of cattle which his land is capable of supporting, and then the right is not improperly described in the declaration, and has been supported by the evidence. See 5 T. R. 48; 1 Sel. N. P. 413. 4th edit.; Willes, 227; Brooke's Abr. tit. Common, pl. 8; 1 Ventr. 54; 2 Keb. 590; Noy, 30; 2 Mod. 105;

* But the allegation "by reason of the possession, &c." is improper if the right do not depend thereon: 4 East, 107; 6 id. 438: and as a title need not to be shown, it should seem that those words may be omitted: see 15 East, 108: and as a general rule it may be as well not to insert it in the declaration, for sometimes the right does not depend on that, as for example, when the common is claimed by grant: see 4 East, 107; 6 id. 438.

Plea, that the cattle were at the said time when, &c. *steers less than two years old, to wit, one year old*, on which issue was joined, The defendant had a verdict; and on a rule nisi to enter a verdict for the plaintiff, *non obstante veredicto*, Gibbs, C. J. held, that as the defendant's right to distrain could only arise from the refusal to pay the penalty imposed according to the custom, a refusal of the plaintiff to pay such penalty should have been stated in the defendant's cognizance, which was therefore bad—Rule absolute.

And it has been consequently held on a plea of enclosure, to prove that every part of the *locus in quo* has been inclosed.*

21. HAWKE V. BACON. M. T. 1809 C. P. 2 Taunt. 156.

In a plea to trespass for breaking, &c. the plaintiff's close, and pulling down walls, &c. the defendant justified, stating that the *locus in quo* was, and immemorially had been, parcel of a certain waste, whereon he had a right of common for all his commonable cattle, *levant, &c.*, and that the walls were wrongfully erected, and standing on the said waste, whereon, &c., and separated the *locus in quo* parcel from the residue of the said waste, whereby the defendant could not fully enjoy his right aforesaid, and therefore he entered, &c. and pulled down, &c. Replication, after denying that the *locus in quo* was parcel, as stated in the plea, and the title under which the defendant claimed, that the plaintiff's close being the same, &c. continually for 20 years and more, had been and was separated, &c.; to which the defendant rejoined; and on demurrer to another part of the pleadings the court observed, that had the defendant taken issue on the replication, he would have thrown on the plaintiff the *onus* of proving that every part of the *locus in quo* had been inclosed for the space of 20 years.

22. D'AYROLLES V. HOWARD. E. T. 1763. K. B. 3 Burr. 1385.

To an action of trespass for spoiling and destroying peat, filling up holes, &c. the defendant pleaded a right of common, and that, by reason of the plaintiff's digging peat, he had been injured, on which he filled up the holes. The plaintiff replied *de injuria* generally, and then desired to give in evidence that sufficient common had been left; but, as it was the wish of the parties that the merits of the case should be fully tried, it was ordered by the Court that a verdict for the defendant, which they would otherwise have sustained, should be set aside on payment of costs by the plaintiff.

6. Of the witnesses.

1. WALTON V. SHELLEY. T. T. 1786. K. B. 1 T. R. 302.

Per Buller, J. If the issue be on a right of Common, which depends on a custom pervading the whole manor, the evidence of a commoner is not admissible; because, as it depends upon a custom, the record in that action would be evidence in a subsequent action, brought by that very witness to try the same right; therefore there is good reason for not receiving his testimony in such a case. But the same reason does not hold where common is claimed by prescription, in right of a particular estate; because it does not follow if A. has a prescriptive right of common belonging to his estate, that B., who has another estate in the same manor, must have the same right; neither would the judgment for A. be evidence for B.; and yet there are cases which lay it down as a general rule, that one commoner is in no case a witness for another. See 3 T. R. 32; Bull, N. P. 283; 1 P. Wms. 288; 2 Vern. 699; 2 Atk. 615.

* So in order to nullify a plea of common of vicinage, proof is needful that the lord of either waste has entirely inclosed some part, however small; for it has been seen, that if there be the least avenue for egress and regress, whereby the cattle may mutually escape, the common of vicinage continues; 3 Keb. 24; 13 East, 348.

† So owners of common fields may show a custom to inclose, which may be done by the production of old deeds, and the testimony of aged witnesses; see 2 Wills, 269. The lord may show a long custom to erect houses on the waste in exclusion of the commoners; 5 T. R. 417. Counterparts of old leases from the muniments of a manor, showing that part of the waste has been demised by the lord, although unaccompanied by proof of enjoyment, will be evidence to establish a custom for the owners of moss dales to hold them in severalty after they have been entirely cleared of turves by the tenants of the manor; 5 T. R. 412. n. Allotments under inclosure acts may also be in evidence, both at the instance of lords and commoners; see *post*, tit. Inclosure.

‡ It may perhaps, be said, that if he were allowed to be a witness, he could not afterwards use the verdict; for on the trial of his own cause, if it should appear that he was a

The general rule is, that if the issue be on a customary right of common by the establishment of which the witness would be benefitted, he is incompetent; but that where he gives evidence to establish the private prescriptive right of another, his evidence may be received.

2. REEVES v. SYMONDS. H. T. 1715. K. B. 10 Mod. 291.

[660]

Per Parker, C. J. If an action be brought by a commoner for his right of This distinction was, however, at one time not recognized; common, shall another person that claims a right of common upon the same title be allowed to give evidence? No; and yet it is certain that he can neither get nor lose in that cause; for the event of that cause will no way determine his right. But though he is not interested in that cause, he is interested in the question upon which the cause depends, and that will be a bias upon his mind. It is not his swearing the thing to be true that gives him any advantage; but it is the thing being true; and the law does judge that it is not proper to admit a man to swear that to be true which it is plainly his interest should be true.

3. HARVEY v. COLLISON. Norfolk Summer Ass. 1727. MSS. 1 Sel. N. P. Although such contrary opinion was but for a short period attended to.

In replevin, defendant avowed taking the cattle damage feasant; plaintiff prescribed for common in the *locus in quo*, as appendant to his messuage. The plaintiff produced as a witness a person who claimed common in the same place. His testimony being objected to, Raymond, C. J. overruled the objection, that where a person prescribes for common not as appendant to his messuage, but by virtue of a custom within a parish or manor, and the custom is in issue, there a person within a manor or parish claiming common is interested, and cannot be a witness; but where a person prescribes for common, for all cattle *levant et couchant* on his messuage, as belonging to that messuage, there is nothing but that person's particular right of common in question, as belonging to that particular messuage; and another person who claims common in the same place by virtue of another messuage, may be a witness, because not interested in the present question.†

4. ANSCOMB v. SHORE. E. T. 1808. C. P. 1 Taunt. 261; S. C. 1 Camb. 285.

S. P. HOCKLEY v. LAMB. Lent Assizes. 1697. 1 Id Raym. 731. S. P. [661]

KENNETT v. FOSTER. MSS. Sel. N. P. 440. 6th ed.

The declaration in this case stated a right of common in the plaintiff by prescription, and declared that the onus lay on the defendant to repair the fences of his close adjoining the common; and alleged that in consequence of his suffering them to be ruinous, the plaintiff's cattle had strayed into the said close, whereby the plaintiff had lost the use of them. In order to show the defendant's liability to repair, several inhabitants were called, when their evidence was rejected by the defendant's counsel on account of their interest in the event of establishing the plaintiff's case. The plaintiff was nonsuited; and, on a rule nisi for a new trial, it was holden that the witnesses produced were clearly incompetent, as if the plaintiff succeeded, all his fellow commoners would be relieved from the burden of repairing, or keeping proper persons to prevent infringement of the bounds of the common.—Rule discharged. See 12 Vin. Abr. 14.

5. BURTON v. HINDE. E. T. 1793. K. B. 5 T. R. 174.

In an action of trespass, where the question was, whether a corporation who had inclosed part of a common, and leased it, with a reservation of rent to themselves, had left a sufficiency for the commoners, a freeman of the corporation was called to prove the affirmative; but Gould, J. rejected him, and witness in the former suit, to admit the verdict as evidence for him would be in effect allowing a party to give evidence for himself. The answer to this objection seems to be, that the fact of his having given evidence in the former case would probably be unknown at the time of the second suit; and even if that fact should be fully proved, yet it would be presumed that he was disinterested, and then the verdict might, perhaps, be evidence for him upon the same principle which allows the depositions of a witness in a suit in equity to be evidence for him on a bill of revivor brought by the witness himself.

† Mr. Selwyn, in his Treatise on the Law of Nisi Prius, p. 440. says, that it would appear from the above case, that the witness was called to establish a right of common in the party by whom he was called; the effect of which would be to narrow and abridge the witness's right; but in a case (Kennett v. Foster, *post*, 661.) where the witness was called by the plaintiff to show that the defendant had no right, the learned judge rejected his testimony, on the ground that he was interested in the question, inasmuch as negating the defendant's right would go to enlarge the witness's right.

COMMON.—Of the Lord's Remedies.

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of vicinage in the lands in question; B. N. P. 253; and
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edit. The accuracy of this position has been with great propriety doubted; see 11 H. S.
L. E. 47; and Petersdorf's Supplement to the 3d vol. of B. N. P. 253; and
1 A plaintiff is entitled to costs in actions for the recovery of damages, or compensation
e. 4 & 3, and 2 H. S. c. 19 & 3, and in actions for the recovery of damages, or compensation
for rents, damages, or for damage to the land, or the making of the same, or the making of the same
judicial action, be found in favor of the plaintiff, and in such case, the plaintiff shall be entitled to
damages to which a plaintiff is entitled in such case, and in such case, the plaintiff shall be entitled to
repairs, founded upon damages, or compensation, or damages, or compensation, or damages, or compensation,
states of Wisconsin, and in such case, the plaintiff shall be entitled to damages, or compensation,
which gives double or treble damages, and in such case, the plaintiff shall be entitled to damages,
who, under 3 & 4 E. 6. c. 3 & 4, (which contains the statute of the state of Wisconsin, and in such
case 2 relating to approval of wastes) become entitled to damages, or compensation, or damages, or compensation,
of the state, and in such case, the plaintiff shall be entitled to damages, or compensation, or damages, or compensation,

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entitled to full costs under the stat. 22 & 23 Car. 2. c. 29. s. 136. there being no certificate. And although it was urged that, according to the construction put upon the stat. 22 & 23 Car. 2. if it either appeared that the judge could not have certified, or that, upon the face of the pleadings, the title could not have come in issue, the case was not within it, and the plaintiff was entitled to full costs, though the verdict was under 40s., and the judge did not certify; and that, upon the pleadings before the Court, the title could not have come in question, as it might if only the general issue had been pleaded; for then the defendant might have proved that it was his fence; and that, by the special plea, the defendant alleged that the fence was wrongfully erected on a common upon which he had a right of common, it stood confessed upon the record that the fence was erected on the common; and though, if he had a right of common, he might justify the throwing it down to enjoy his right, yet he could not justify the total destruction and burning of it, which therefore stood upon the general issue; that the whole record must be taken together; that the special plea negatived any claim of the defendant to the soil, so that the title to the soil could not come in question, and the defendant, as commoner, could not meddle with the soil; the Court held that they could not look into the plea, in order to see that the plaintiff's freehold could not possibly come in question; and, as on the declaration it might have been disputed, and no certificate from the judge was before the Court, the plaintiff could not have more costs and damages. See *Hullock on Costs*, 64; 3 T. R. 391; 6 id. 281. 483. 562; 2 Mod. 65; 11 id. 198; 1 Burr. 265; 3 Wils. 322-4; 1 East, 350; 6 Vin. Abr. 357; Barnes, 121; et ante, vol. ii. p. 388.

2d. By distress.

1. THOMAS V. NICHOLS. H. T. 1681. C. P. 3 Lev. 41. S. P. 3 Wils. 126.

Trespass for entering plaintiff's close and spoiling his grass, &c. and taking and driving his beasts to places unknown, so as they could not be replevied. The defendant pleaded that the place where, &c. is a waste place parcel of his manor, and that the beasts of the plaintiff were there intermixed with the beasts of strangers, which had no right there; and because he could not sever the beasts of the plaintiff from those of the strangers, he drove them altogether to a pound within the waste to part them, and there severed them, and drove the strangers' beasts out of the waste, and left the beasts of the stranger in the waste. The Court held, that the lord of the manor, or any commoner seeing a stranger's beasts there may impound or drive them out of the common without custom; and to sever them from the beasts of the commoners, if it cannot otherwise be done, may drive them and the beasts of the commoners together, to a convenient place to separate them. But where the usage is at certain times of the year to drive a common for view, if the beasts of strangers are found there, or if the common be over-charged, in such case the party must prescribe, and show the custom; but here, in this case, the beasts of strangers were seen in the common, and that was sufficient.

2. ELLIS V. ROWLES. M. T. 1752. C. P. Willes, 638.

Trespass was brought for impounding the plaintiff's cattle, to wit, one bullock and one ox. The defendant justified, as servant of the lord of the manor; and it appeared from the replication that the plaintiff's right was for a limited number and description of cattle. It was urged, that it did not appear from the pleadings that the defendant had a right to distrain this ox; for that, as it was admitted on the record that the plaintiff had a right to put one ox on the common, the defendants ought to have alleged that the plaintiff first put on one ox, and afterwards the ox in question, and that they distrained the latter as a surcharge unless they were both turned on together. And the Court said, that it ought to have been stated whether the oxen were turned on the common together or separately; and if the latter, which of the two was first turned on; and that it did not now appear whether or not the defendants were justified in distraining the ox in question. And they gave judgment for the plaintiff. See 4 Burr. 2426.

3. HALL V. HARDING. E. T. 1769. K. B. 4 Burr. 2426, S. C. 1 Bl. Rep. 673.
- In replevin for taking the plaintiff's sheep on Whitmanslie Down the defen-

The lord may distress the beasts of a stranger damage a waste.

[664] So of a commoner, where the number he may depasture is limited. In this case, it was, however, resolved, that though the plaintiff had a right of pasture for one ox on the waste, yet that the lord could only take the ox put on last, unless both were turned out together;

But it does not appear that such

[653] were very extensive, and connected with other common land. The defendant relied on a judgment; on a verdict found in the year 1665, which defined the right of the customary tenants of the manor possessed by the plaintiff, and which restricted that right to the limits contended for by the defendant. The judge expressed his opinion, that as the plaintiff had failed in establishing a right previous to the year 1665, the question for consideration was, whether the evidence adduced would warrant a presumption of grant since that period, and he thought it was insufficient to that end. On the jury finding for the defendant, a rule nisi for a new trial was obtained, when the Court held that though it had been clearly proved that the plaintiff and his ancestors had exercised the right contended for, it must be supposed that such use had been by sufferance; it being impossible, or too troublesome an undertaking, to hinder the trespass. —Rule discharged.

Or the waste has been depastured through mistake and ignorance of the boundaries of two adjoining commons.

9. HETHERINGTON V. VANE. E. T. 1821. K. B. 4 B. & A. 428.

The common of Wythop and Embleton lay open to each other, and the boundaries had not been ascertained till a dispute arose between two parties in the neighbourhood, on which the exact limit was discovered. The plaintiffs were possessed of a house and land at Embleton, but, through ignorance, they had for 60 years exercised commonable rights on Wythop; they had received a due allotment in respect of their profits on Embleton common, and now they sought for an allotment out of Wythop. The judge left it to the jury to say, whether this user was to be considered as an adverse enjoyment in Wythop, acquiesced in by the commoners there, or a mistake as to the boundary of the plaintiff's common; and the jury found a verdict for the defendant, which was sustained by the Court, who approved of the direction of the judge at the trial.

10. DRURY V. MOORE. M. T. 1815. K. B. 1 Stark. 102.

Evidence of long enjoyment of a right of common is, however, strong proof, unless rebutted by contrary presumptions.*

Case against a lord of a manor for inclosing a common. Several very old persons proved that the plaintiff, and those from whom he claimed, had enjoyed the right contended for during a long period; it was also shown that the defendant, who was the lord, at one period by deed granted part of the common for the erection of a mill, for the advantage of the poor, subject to the confirmation of the commoners. The defendant offered to prove that a practice had existed, from an early date, for the lord of the manor to build houses and let them, with a part of the common annexed. But the judge observed, that the plaintiff's evidence was of so much higher a nature than that adduced on the part of the defendant, that it would be futile to produce it.—Verdict for plaintiff.

[654] 11. ROGERS V. BUNSTEAD. Cam. Sum. Ass. 1727. K. B. Sel. N. P. 440. MSS. 6th ed.

The next thing to be proved is the levancy or couchancy of the cattle;

Trespass for entering plaintiff's close with cows and sheep, and destroying his grass. As to sheep, plea not guilty, and issue thereon. As to cows, defendant justified, and prescribed for common, for all cattle except sheep) *levant couchant* on defendant's messuage, and one acre of land; the issue was on the levancy, and couchancy. The evidence on the first issue was, that the defendant's sheep were seen at several times depasturing in *locus in quo*, and that at such time the defendant's shepherd was with them. It was insisted for the defendant, that as it did not appear that defendant had knowledge or consented that his sheep should feed there, and had a servant to take care of them, the shepherd, and not the defendant, was the trespasser, and that the action could not be maintained against the master. Per Lord Raymond, C. J.—

* Where the right claimed is for estover, turbary, piscary, or the like, the evidence must accord therewith. Proof must in those instances be adduced of the plaintiff's possession of the house to which the right appertains. The party then shows his custom to take the profits for the purposes of repairing his house, for fuel, or for sustenance. The proof of common in gross, when claimed by grant, is by putting in the deed; or if by prescription, by calling as many old witnesses as can be found to speak to the long enjoyment which the plaintiff or his ancestors have had of the profits in question, of which the deed becomes a corroborating auxiliary, when a common appurtenant is by deed, the same course should be observed.

"The action lies against the master; his sheep did the trespass; he has his remedy against the servant." As to the second issue, the evidence was, that defendant was seized of a copyhold messuage, and one acre of pasture land, that he foddered eight or nine cows in the yard of the said messuage, with hay brought from another farm about two miles off. Lord Raymond, C. J. These cows cannot be *levant couchant* upon the one acre; for I am clear that levancy and couchancy is a stint of common *sans nombre*, and signifies only so many as the messuage or farm will by its produce maintain. I know there are cases which say, that foddering in a yard makes a levancy and couchancy; but the meaning is, foddering with stubble, &c. produced from the messuage or land itself, to which the yard belongs; for example, if an acre of land will produce only so much hay, &c. as will maintain but one cow, the occupier shall not put two on the common, because he foddered them in the yard with the produce of other land; for, by the same rule, he might put 1000 of his own, or of other persons, and deprive the other commoners of the benefit of common.*

12. FULCHER v. SEALES. Norfolk Sum. Ass. 1738. K. B. MSS. 1 Sel. N. P. 6th ed.

Trespass for impounding plaintiff's colt and three fillies. Defendant set out his right to a messuage with appurtenances, to which the defendant has a right of common belonging to the *locus in quo*; and that the defendant took the cattle damage feasant. Plaintiff replies, that he is possessed of a copyhold messuage in Drayton, and prescribes for a right of common in the *locus in quo*, for all commonable cattle, *levant et couchant*, on the same messuage at all times of the year. Defendant *protestando*, that plaintiff has not such right; traverses the levancy and couchancy of the beasts taken, and issues thereon. Per Lee, C. J. "The *protestando* is not part of the issue, and needs not to be proved." It appeared by the evidence, that the messuage was only a yard where the horses were foddered, and one acre of orchard, with the produce of which the plaintiff could not maintain the colt and three fillies, and for that reason he foddered them with hay and straw from other land hired by him. Per Lee, C. J. "These beasts cannot be *levant et couchant* on this yard, though they are foddered there, unless they can be foddered with the produce of the messuage, and so it was determined by Lord Raymond in *Rogers v. Benstead*, supra, p. 654, after much consideration, that levancy and couchancy signify what the produce of the estate will bear, and is a stint of common with respect to other commoners; and I know no difference as to this, whether the common is for the whole year, or for half a year only.—Plaintiff nonsuited.—See 1 Mod 105; 14 E. 4. 32.

Which evidence must be commensurate with the claim.† [655]

* So if the plaintiff prescribe generally for commonable cattle, evidence of a right of common only for some particular species of commonable cattle will not maintain the issue; *Pring v. Henley*, Bull. N. P. 59; *Rotherham v. Green*, Cro. Eliz. 503; Bull. N. P. 60; 1 Campb. N. P. C. 309. 315.

† So many are *levant et couchant* as the land to which the common is appurtenant will maintain in winter; Noy. 30; Vent. 54; 6 T. R. 741: and common cannot be claimed as appendant to a house without any curtilage or land; Salk. 169. 2 Brownl. 101; 2 Ld. Raym. 1015; Noy. 30. And therefore, where a plaintiff in an action for the disturbance of his right of common claimed the right for all commonable cattle *levant et couchant*, and it appeared that the house of which he was the owner had neither land, curtilage, nor stable belonging to it, the plaintiff was nonsuited; 5 T. R. 46. And, therefore, although the declaration, or plea of justification, allege the right of common to be appendant to a messuage, it must be proved that there is at least a curtilage belonging to it, on which the cattle may be *levant et couchant*; Sir W. Jones, 227. But in order to prove that the cattle in question are *levant et couchant*, it must be proved that they are connected with the land on which they are alleged to be *levant et couchant*; 1 Wil. Saun. 346. c. in note. In the case of a distress, those cattle only are said to be *levant et couchant* which have been there for a space of time long enough for them to have lain down and risen up again. But in a case of right of common appendant, levancy and couchancy is merely a mode of ascertaining the number of cattle which are entitled to the right of common. 1 B. & A. 706. The defendant must prove that the cattle are his own, or that he has a special property in them; Bro. Com. 47; 2 Show. 328; for a man has no right to use the common with the cattle of a stranger, or with his own cattle *levant et couchant* upon some other land, and not upon the land to which the right is appendant or appurtenant; but if he borrow cattle to compester his land, they may be put upon the common, for he has a special property in them; Skin. 137; F. N. B. 180; Roll. Com. 462.

Which in fact is no more than a general rule of evidence, and consequently combines in itself the universal maxim that though the party will be obliged

13 THE BAILIFFS, BURGESSES, &c. OF TEWKESBURY V. BRICKNELL. H. T. 1808. C. P. 1 Taunt. 152.

A declaration in case for selling corn by sample, having stated that the plaintiffs being possessed of a certain market in T. for the buying and selling of corn, were entitled, by reason thereof, to a reasonable toll on all corn brought into the said market for sale, except on corn sold there by or to any freeman of the said borough; and on corn of any other person legally exempt from the same; and it being proved that the exemption attached only on corn sold by a freeman, it was urged that the declaration was not proved as laid, and the plaintiff was nonsuited. But the Court made absolute a rule for setting it aside.

to prove as much as he claims, his case will not be prejudiced by proof of a more ample right.*

[656] But it has been hold on unnecessary to support claim of common for cattle *levant et couchant*, that the common should be adequate to the support of the cattle for any length of time.

The next thing required in proof is the exercise of the right.†

[657] The plaintiff may, to rebut such proof, show whatever may go to overturn the right of common;

14. WILLIS V. WARD. M. T. 1818 C. B. 2 Chit. Rep. 297.

Verdict for plaintiff in an action for disturbance of common. Motion to set it aside, on the ground that the allegation in the declaration was, that the plaintiff was entitled to a right of common for all his cattle *levant et couchant*, whereas it appeared in evidence that the common was not sufficient to feed all the cattle for any length of time, and that the right could not possibly exist in the manner in which it was set forth. But the Court refused the defendant's application; and said, nature, it seems, has set a limit to the exercise of the right of common; but the plaintiff is clearly entitled to the right he avers he is possessed of, although, from the limited extent of the common, he would not be able to keep his cattle there long with benefit.—Rule refused. See 1 Saund. 28 & 28 a.; 1 B & A. 706.

15. BRYAN V. WINWOOD. E. T. 1808. C. P. 1 Taunt. 208.

In ejectment for a piece of ground which had been inclosed from the common, the plaintiff, as lord of the manor, proved acts of encroachment on the waste by himself and other freeholders of the manor, and the payment of quit rents to himself for like inclosures. The defendant appeared to be a tenant for lives, and to hold of the lessor of the plaintiff; but one part of the ground claimed had been inclosed 30 years before this action was brought, but during the lease, and had been holden without paying any acknowledgement. It was urged that the plaintiff was precluded by length of time; and an objection was urged that the fact of the plaintiff having proved his right to one part, could not be adduced as conclusive evidence of his title to the latter part. But the judge admitted the evidence.

16. As a general rule, it may be premised that whatever tends to defeat the right claimed will consequently operate as a bar to the prescription pleaded. The lord of the manor in which the waste is mav. for instance set up a defence of inclosure; some act of approvement should, therefore, be adduced to show

* When a party prescribes absolutely, and proves a prescriptive right, subject to a condition or limitation, the sufficiency of the proof to maintain the issue seems to depend upon this, whether the condition or limitation is part of one entire prescription, or whether it is not another distinct prescriptive right, and the subject of another action rather than a part of the prescription alleged. In the case of Branks v. Willet, 2 H. Bl. 224. where a prescriptive right of common appurtenant was claimed for a certain number of sheep every year, and at all times of the year, and this general right was proved, but it also appeared that the tenant of an adjoining farm was entitled to have the sheep folded on his lands whenever they were fed on the common, an objection was taken on the ground of a variance between the plea and the proof; but the Court of C. P. on consideration held, that the words "at all times," must be understood according to the subject matter, and the general course of feeding sheep, which seldom if ever remained during the night on the common, but were folded; these words must therefore be understood as meaning at all usual times, and the folding of the sheep at night was no part of entire prescription for common of pasture, but rather a consideration subsequent to the enjoyment of the right, and not necessary to be stated.

† Which must accord with the fact, as for instance, as to the number of beasts; 12 Via. Ab. Com.; 13 H. 7. 13; or the season of the year; Carth. 241. Where estovers, turf, or the like commonable profits are prescribed for, for the purpose of repairs, &c. there should be an averment that the house, palings, fences, hedges, &c. stood in need of such repairs; or where they are claimed as appurtenant to a house to be used as fuel, proof should be given that they have been usually so expended.

his intention to inclose, and the courts will take notice judicially of his right to do so.

17. *WALKER v. BROADSTOCK*. Summer Ass. 1795. Ex. 1 Esp. N. P. C. 459.

To establish a prescriptive right to common appurtenant, *per cause de vicinage*, the defendants called witnesses, who proved that two several tenants, who had holden the premises prior to the plaintiff, of whom one was dead, and the other had no interest in the cause, had declared their opinion that no such right vested in the tenants of the land in question. It was contended that these declarations, being made by occupiers of the premises, must be considered good evidence against their own rights, and the evidence was admitted.

18. *DUNSTAN v. TRESIDER AND ANOTHER*. M. T. 1792. K. B. 5 T. R. 2.

To an action of trespass for breaking and entering the plaintiff's close, the defendant pleaded that the *locus in quo* was parcel of the manor of H., and that an ancient messuage and land were immemorially parcel of the said manor, and that there is a custom in the manor that from time whereof, &c. the customary tenant for all the time aforesaid, has had right of common, &c. Replication, traversing the custom. It appeared that the plaintiff proved that the tenement was built within the last 20 years, and was not built in the site of any ancient messuage. It was contended that this evidence should not be admitted, urging that the antiquity of the messuage was admitted by the replication, which traversed the custom. But the judge before whom the cause was tried being of opinion that the antiquity of the messuage formed a part of the custom, and was involved in the issue, received the evidence, and the plaintiff obtained a verdict. On a motion for a new trial, the Court said: the verdict is right, as the evidence disproved the custom, which was traversed.—The rule must be therefore refused.

19. *TYRWITT v. WYNNE*. E. T. 1819. K. B. 2 B. & A. 554.

To an action of trespass the defendant, who was lord of the manor, pleaded that the *locus in quo* was his soil and freehold, on which issue was joined.—After some documentary evidence on the part of the defendant, it was proposed to read counterparts of leases of minerals granted to several persons, not connected with the plaintiff, in other parts of the waste of the manor, but not in the place in question. These deeds were rejected by the learned judge, and the Court upheld that opinion for two reasons: 1st. Because it ought to have been shown that the *locus in quo* formed part of the entire waste to which the leases were applicable, inasmuch as acts of ownership on the other parts of those waste could not prove that the *locus in quo* was part of them; and 2d. That if that had been done, still that they would only have been evidence of the defendant's right to the minerals under the *locus in quo*, but would not have established his title to the surface.

20. *CLEARS v. STEVENS*. T. T. 1818. C. P. 2 B. Moore, 464; S. C. 8 Taunt. 413.

The defendant, in an action of replevin, acknowledged the taking as bailiff; and after stating a custom existing in the manor for a court leet to be holden before the steward for the time being when necessary; and that it had been the custom for the jurors of the said court to make such by-laws as they might deem necessary respecting the stocking, depasturing, &c. of the said common, and to inflict such penalty on all persons offending against such by-laws, as the said jurors should think expedient; and that there was a custom in the said manor to distrain in case of the refusal of any person who had been found subject to such penalty; averred, that at a court leet it was ordered that no person should keep on the said common any steers after two years old, on pain of a penalty; that the cattle, in the declaration mentioned, being steers more than two years old, were at the said time, when, &c. in the place in which, &c. wherefore the defendant as, &c. took the said cattle for the said damage as aforesaid.

* On issue joined as to a right of common, the defendant may give in evidence a release of the right of common although he might have pleaded it; Clayton, 9; 8 C. 1. Such a release, however, will not avail where the common belongs to land which is entailed, and which cannot pass by release any more than the land itself; ibid.

Plea, that the cattle were at the said time when, &c. *steers less than two years old, to wit, one year old*, on which issue was joined, The defendant had a verdict; and on a rule nisi to enter a verdict for the plaintiff, *non obstante veredicto*, Gibbs, C. J. held, that as the defendant's right to distrain could only arise from the refusal to pay the penalty imposed according to the custom, a refusal of the plaintiff to pay such penalty should have been stated in the defendant's cognizance, which was therefore bad — Rule absolute.

And it has been consequently held, on a plea of enclosure, to prove that every part of the *locus in quo* has been inclosed.*

21. *HAWKE v. BACON*. M. T. 1809 C. P. 2 Taunt. 156.

In a plea to trespass for breaking, &c. the plaintiff's close, and pulling down walls, &c. the defendant justified, stating that the *locus in quo* was, and immemorially had been, parcel of a certain waste, whereon he had a right of common for all his commonable cattle, *levant*, &c., and that the walls were wrongfully erected, and standing on the said waste, whereon, &c., and separated the *locus in quo* parcel from the residue of the said waste, whereby the defendant could not fully enjoy his right aforesaid, and therefore he entered, &c. and pulled down, &c. Replication, after denying that the *locus in quo* was parcel, as stated in the plea, and the title under which the defendant claimed, that the plaintiff's close being the same, &c. continually for 20 years and more, had been and was separated, &c.; to which the defendant rejoined, and on demurrer to another part of the pleadings the court observed, that had the defendant taken issue on the replication, he would have thrown on the plaintiff the onus of proving that every part of the *locus in quo* had been inclosed for the space of 20 years.

22. *D'AYROLLES v. HOWARD*. E. T. 1763. K. B. 3 Burr. 1385.

To an action of trespass for spoiling and destroying peat, filling up holes, &c. the defendant pleaded a right of common, and that, by reason of the plaintiff's digging peat, he had been injured, on which he filled up the holes. The plaintiff replied *de injuria* generally, and then desired to give in evidence that sufficient common had been left; but, as it was the wish of the parties that the merits of the case should be fully tried, it was ordered by the Court that a verdict for the defendant, which they would otherwise have sustained, should be set aside on payment of costs by the plaintiff.

6. Of the witnesses.

1. *WALTON v. SHELLEY*. T. T. 1786. K. B. 1 T. R. 302.

Per Buller, J. If the issue be on a right of Common, which depends on a custom pervading the whole manor, the evidence of a commoner is not admissible; because, as it depends upon a custom, the record in that action would be evidence in a subsequent action, brought by that very witness to try the same right; therefore there is good reason for not receiving his testimony in such a case. But the same reason does not hold where common is claimed by prescription, in right of a particular estate; because it does not follow if A. has a prescriptive right of common belonging to his estate, that B., who has another estate in the same manor, must have the same right; neither would the judgment for A. be evidence for B.; and yet there are cases which lay it down as a general rule, that one commoner is in no case a witness for another. See 3 T. R. 32; Bull, N. P. 283; 1 P. Wms. 288; 2 Vern. 699; 2 Atk. 615.

* So in order to nullify a plea of common of vicinage, proof is needful that the lord of either waste has entirely inclosed some part, however small; for it has been seen, that if there be the least avenue for egress and regress, whereby the cattle may mutually escape, the common of vicinage continues; 3 Keb. 24; 13 East, 348.

† So owners of common fields may show a custom to inclose, which may be done by the production of old deeds, and the testimony of aged witnesses; see 2 Wills, 269. The lord may show a long custom to erect houses on the waste in exclusion of the commoners; 5 T. R. 417. Counterparts of old leases from the muniments of a manor, showing that part of the waste has been demised by the lord, although unaccompanied by proof of enjoyment, will be evidence to establish a custom for the owners of moss dales to hold them in severalty after they have been entirely cleared of turves by the tenants of the manor; 5 T. R. 412. n. Allotments under inclosure acts may also be in evidence, both at the instance of lords and commoners; see *post*, tit. Inclosure.

‡ It may perhaps, be said, that if he were allowed to be a witness, he could not afterwards use the verdict; for on the trial of his own cause, if it should appear that he was a

The general rule is, that if the issue be on a customary right of common by the establishment of which the witness would be benefitted, he is incompetent; but that where he gives evidence to establish the private prescriptive right of another, his evidence may be received.

2. REEVES v. SYMONDS. H. T. 1715. K. B. 10 Mod. 291.

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Per Parker, C. J. If an action be brought by a commoner for his right of common, shall another person that claims a right of common upon the same title be allowed to give evidence? No; and yet it is certain that he can neither get nor lose in that cause; for the event of that cause will no way determine his right. But though he is not interested in that cause, he is interested in the question upon which the cause depends, and that will be a bias upon his mind. It is not his swearing the thing to be true that gives him any advantage; but it is the thing being true; and the law does judge that it is not proper to admit a man to swear that to be true which it is plainly his interest should be true.

3. HARVEY v. COLLISON. Norfolk Summer Ass. 1727. MSS. 1 Sel. N. P. Although 439. 6th ed.

In replevin, defendant avowed taking the cattle damage feasant; plaintiff prescribed for common in the *locus in quo*, as appendant to his messuago. The plaintiff produced as a witness a person who claimed common in the same place. His testimony being objected to, Raymond, C. J. overruled the objection, that where a person prescribes for common not as appendant to his messuago, but by virtue of a custom within a parish or manor, and the custom is in issue, there a person within a manor or parish claiming common is interested, and cannot be a witness; but where a person prescribes for common, for all cattle *levant et couchant* on his messuago, as belonging to that messuago, there is nothing but that person's particular right of common in question, as belonging to that particular messuago; and another person who claims common in the same place by virtue of another messuago, may be a witness, because not interested in the present question.†

4. ANSCOMB v. SHORE. E. T. 1808. C. P. 1 Taunt. 261; S. C. 1 Camb. 285.

S. P. HOCKLEY v. LAMB. Lent Assizes. 1697. 1 Ld Raym. 731. S. P.

KENNETT v. FOSTER. MSS. Sel. N. P. 440. 6th ed.

The declaration in this case stated a right of common in the plaintiff by prescription, and declared that the onus lay on the defendant to repair the fences of his close adjoining the common; and alleged that in consequence of his suffering them to be ruinous, the plaintiff's cattle had strayed into the said close, whereby the plaintiff had lost the use of them. In order to show the defendant's liability to repair, several inhabitants were called, when their evidence was rejected by the defendant's counsel on account of their interest in the event of establishing the plaintiff's case. The plaintiff was nonsuited; and, on a rule nisi for a new trial, it was holden that the witnesses produced were clearly incompetent, as if the plaintiff succeeded, all his fellow commoners would be relieved from the burden of repairing, or keeping proper persons to prevent infraction of the bounds of the common.—Rule discharged. See 12 Vin. Abr. 14.

5. BURTON v. HINDE. E. T. 1793. K. B. 5 T. R. 174.

In an action of trespass, where the question was, whether a corporation who had inclosed part of a common, and leased it, with a reservation of rent to themselves, had left a sufficiency for the commoners, a freeman of the corporation was called to prove the affirmative: but Gould, J. rejected him, and witness in the former suit, to admit the verdict as evidence for him would be in effect allowing a party to give evidence for himself. The answer to this objection seems to be, that the fact of his having given evidence in the former case would probably be unknown at the time of the second suit; and even if that fact should be fully proved, yet it would be presumed that he was disinterested, and then the verdict might, perhaps, be evidence for him upon the same principle which allows the depositions of a witness in a suit in equity to be evidence for him on a bill of revivor brought by the witness himself.

† Mr. Selwyn, in his Treatise on the Law of Nisi Prius, p. 440. says, that it would appear from the above case, that the witness was called to establish a right of common in the party by whom he was called; the effect of which would be to narrow and abridge the witness's right; but in a case (Kennett v. Foster, *post*, 661.) where the witness was called by the plaintiff to show that the defendant had no right, the learned judge rejected his testimony, on the ground that he was interested in the question, inasmuch as negating the defendant's right would go to enlarge the witness's right.

[661]

It may be therefore taken for granted, that one commoner cannot be evidence for another on a point tending to the mutual advantage of both;

On these grounds a freeman of

a corporation has been considered not a competent witness to prove that a sufficient quantity of common has been left by the aggregate body.

Under all circumstances, however, where the witness comes to answer his own right, the court does not intend to prevent.

directed a nonsuit. On motion to set it aside, the Court held that the defendant must have been received for the use of the common land, the fact that it was proved that the rent was reserved to the mayor and his heirs, the corporation, and that the amount of the rent was exceeding small.

H. & L. v. L. & L. (1897) N. P. 100, 2 Exch. 7.

In this case, *H. & L. v. L. & L.*, said, that if A, B, C, D, and E, commoners in a town, and D, a commoner of all other persons, and the commoner of A, comes in evidence B, may be a witness to prove that A, has right of common there, because, in effect, B, charges himself, viz. he admits knowledge of the common with himself.

Of the rent and damages.

A tenant is of course entitled to an action for right to the same right. *Cambridge v. C. C. (1897) 45 All England Rep. 7.* The damages must be proved in the nature of the action, as well as the fact, and the injuries sustained.

Of the damages.

Ann. H. T. (1897) K. B. Comb. 420.

This was an action for trespass and for pulling up and throwing down a hedge. The Court held that the damages were not to be assessed on the basis of the value of the land, but on the basis of the value of the hedge, and that the damages were to be assessed on the basis of the value of the land, and that the damages were to be assessed on the basis of the value of the land.

St. v. St. (1897) H. T. 100, K. B. 7 East, 325.

Trespass for destroying the plaintiff's hedges and fences. The defendant alleged a right of common, and that the hedges were wrongfully erected. The Court held that the defendant's right of common, a verdict was given for the defendant on the general issue, and for the plaintiff on the special issue. The judge, in having certified, a rule was obtained calling on the defendant to show cause why the master should not tax the plaintiff's costs. Cause was now shown, when it was contended that the special plea not going to the whole trespass, being found for the defendant, left the case as if the general issue only had been pleaded, and then, unless the Court could say that, upon the face of the declaration, it was impossible for the judge to have certified that the title of the land was in question, the plaintiff was not

* It has been said to be not a good exception to a witness that he has common because of damage in the lands in question; *B. N. P. 255*; and *100* and *E. 109*. The same rule, it would seem, holds with regard to common of Shepherds; *B. N. P. 255*, n. c. Bridgman's edit. The accuracy of this position has been with great propriety doubted; see *Phillip's L. E. 47*; and *Petersdorff's Supplement* to the 3d vol. of *Bl. Com.* 27, 2d edit.

1 A plaintiff is entitled to costs in actions for injuries done to the waste; and by 7 H. 8. c. 4. s. 3; and 21 H. 8. c. 19. s. 3. defendants making avowry, cognizance, or justification, for rents, customs, or for damage feasant, are entitled to costs, if the avowry, cognizance, or justification, be found for them, or the plaintiff be nonsuited, or be otherwise barred. A distress damage feasant is not within the stat. 11 Geo. 2. c. 9. s. 22. which speaks of an action of replevin founded upon distress for rent, relief, heriot, or other service. By virtue of the statute of Gloucester, costs are recoverable where proceedings are had under a statute which gives double or treble damages; from which it may be inferred, that lords of manors, who, under 3 & 4 E. 6. c. 8. s. 4. (which confirms the statutes of Merton and of Westminster 2. relating to appurement of wastes) become entitled to treble damages, are also entitled to their costs. And in cases where parcel of the issues are found for the plaintiff and parcel for the defendant, it is enacted by stat. 4 Anne. c. 16. s. 5. that after permission given to defendants or plaintiffs in replevin to plead several matters, if any such matter shall, upon a demurrer joined, be judged insufficient, costs shall be given at the discretion of the Court; or if a verdict shall be found upon any issue in such a cause, costs shall also be given in like manner, unless the judge who tried the issue shall certify that the said defendant, or tenant, or plaintiff in replevin, had a probable cause to plead such matter; see 2 T. R. 235; 1 Wils. 44; 4 Moore, 110; S. C. 1 B. & B. 465; 11 East, 263; Tidd, Pr. 1001.

† Or under the 8 & 9 W. 3. c. 11. that the trespass was wilful and malicious; *vide ante*, vol. 2, p. 388, n.

§ It is therefore useful to insert a count, stating that some personal property has been taken away, it being a rule that an injury to a personal chattel is not within the 22 & 23 Car. 2; and although such injury be laid in the same declaration with a trespass, yet if the damages be under 40s. the plaintiff is entitled to full costs without a certificate, provided it be a substantive and independent injury; *vide* 3 Wils. 322; S. C. Barnes, 134; 1 Sid. 624; 1 T. R. 656; and other cases abridged, *ante*, vol. 2, p. 389.

entitled to full costs under the stat. 22 & 23 Car. 2. c. 29. s. 136. there being no certificate. And although it was urged that, according to the construction put upon the stat. 22 & 23 Car. 2. if it either appeared that the judge could not have certified, or that, upon the face of the pleadings, the title could not have come in issue, the case was not within it, and the plaintiff was entitled to full costs, though the verdict was under 40s., and the judge did not certify; and that, upon the pleadings before the Court, the title could not have come in question, as it might if only the general issue had been pleaded; for then the defendant might have proved that it was his fence; and that, by the special plea, the defendant alleged that the fence was wrongfully erected on a common upon which he had a right of common, it stood confessed upon the record that the fence was erected on the common; and though, if he had a right of common, he might justify the throwing it down to enjoy his right, yet he could not justify the total destruction and burning of it, which therefore stood upon the general issue; that the whole record must be taken together; that the special plea negatived any claim of the defendant to the soil, so that the title to the soil could not come in question, and the defendant, as commoner, could not meddle with the soil; the Court held that they could not look into the plea, in order to see that the plaintiff's freehold could not possibly come in question; and, as on the declaration it might have been disputed, and no certificate from the judge was before the Court, the plaintiff could not have more costs and damages. See *Hullock on Costs*, 64; 3 T. R. 391; 6 id. 281. 483. 562; 2 Mod. 65; 11 id. 198; 1 Burr. 265; 3 Wils. 322-4; 1 East, 350; 6 Vin. Abr. 357; Barnes, 121; *ante*, vol. ii. p. 388.

2d. By distress.

1. THOMAS v. NICHOLS. H. T. 1681. C. P. 3 Lev. 41. S. P. 3 Wils. 126.

Trespass for entering plaintiff's close and spoiling his grass, &c. and taking and driving his beasts to places unknown, so as they could not be replevied. The defendant pleaded that the place where, &c. is a waste place parcel of his manor, and that the beasts of the plaintiff were there intermixed with the beasts of strangers, which had no right there; and because he could not sever the beasts of the plaintiff from those of the strangers, he drove them altogether to a pound within the waste to part them, and there severed them, and drove the strangers' beasts out of the waste, and left the beasts of the stranger in the waste. The Court held, that the lord of the manor, or any commoner seeing a stranger's beasts there may impound or drive them out of the common without custom; and to sever them from the beasts of the commoners, if it cannot otherwise be done, may drive them and the beasts of the commoners together, to a convenient place to separate them. But where the usage is at certain times of the year to drive a common for view, if the beasts of strangers are found there, or if the common be over-charged, in such case the party must prescribe, and show the custom; but here, in this case, the beasts of strangers were seen in the common, and that was sufficient.

2. ELLIS v. ROWLES. M. T. 1752. C. P. Willes, 638.

Trespass was brought for impounding the plaintiff's cattle, to wit, one bullock and one ox. The defendant justified, as servant of the lord of the manor, and it appeared from the replication that the plaintiff's right was for the mited number and description of cattle. It was urged, that it did not appear from the pleadings that the defendant had a right to distrain this ox; for that, as it was admitted on the record that the plaintiff had a right to put one ox on the common, the defendants ought to have alleged that the plaintiff first put on one ox, and afterwards the ox in question, and that they distrained the latter as a surcharge unless they were both turned on together. And the Court, said, that it ought to have been stated whether the oxen were turned on the common together or separately; and if the latter, which of the two was first turned on; and that it did not now appear whether or not the defendants were justified in distraining the ox in question. And they gave judgment for the plaintiff. See 4 Burr. 2426.

3. HALL v. HARDING. E. T. 1769. K. B. 4 Burr. 2426, S. C. 1 Bl. Rep. 673.

In replevin for taking the plaintiff's sheep on Whitmanslie Down the defen-

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as still in ex-
istence.†

Every right
of common
may be ex-
tinguished
by release
of it to the
owner of
the soil,
and a re-
lease of one
acre will o-
perate as an
entire ex-
tinguish-
ment of the
whole
right.‡

the tenement, in respect of which the action was brought, having vested in the lord by forfeiture, the right of common became extinguished, and the regrant of it as a copyhold tenement, *cum pertinentiis*, did not recreate the right of common. A verdict was found for the plaintiff. A motion was now made to enter a nonsuit, which the Court refused to listen to: observing, when a copyhold tenement is seised into the hands of the lord, it does not therefore lose its right of common; for that right is annexed to all customary tenements demised or demisable by copy of Court roll; and while the estate remains in the lord it continues demisable. If, indeed, the lord grants the fee to a copyholder, it never can again become a copyhold estate, for it ceases to be demisable by court roll; as the case however stands, the rule must be refused.* See Yelv. 189; Ow. 122; Poph. 172; 2 Brownl. 47; 6 Mod. 20.

3. *REX V. HERMITAGE*. E. T. 1691. K. B. Carth. 241.

A right of common was appendant to certain tenements, which were parcel of the Abbey of Sarum in a common that was parcel of the duchy of Cornwall. Upon the dissolution of the Abbey of Sarum, these tenements became vested in king Henry 8. in fee, in whom the duchy of Cornwall was then vested, for want of a duke of Cornwall. Lord Holt, and the rest of the judges resolved, that this was not such an unity of possession as would destroy the right of common, because king Henry 8. had not as perdurable an estate in the one as in the other, for in the duchy of Cornwall the king had only a fee, determinable on the birth of a duke of Cornwall, which was a base fee; but in the tenements in question he had a pure fee simple, indeterminable, *jure coronæ*. See Godb. 4.

4. *REVELL V. SODRELL*. E. T. 1788. K. B. 2 T. R. 421.

It was argued by counsel in this case that a copyholder might, as such, have a right of common in an adjoining manor; but it could never be contended that by purchasing that manor he would extinguish forever the right of common incident to his copyhold, because that would injure the lord. The Court afterwards, in giving judgment on the particular facts of the case, did not controvert the propriety of such argument.

2d. *By release.*

MILES V. ETERIDGE. E. T. 1692 K. B. 1 Show. 358; 1 Keb. 499.

Trespass for throwing down fences; the defendant justified as a commoner. The plaintiff replied, that the defendant's father, under whom he claims, did give license for to make and continue the inclosure to him and his heirs, and issue was joined thereon, *utrum licentiavit modo et forma*. There was a verdict for the plaintiff. A motion was made in arrest of judgment, on the ground that this was an immaterial issue. *Per. Cur.* The Court took time to consider, but in the interim made of these expressions: it is ill by way of licence, but it is good by way of release of common; but a licence is determined by his death. A release of common in one acre is an extinguishment of the whole common.

3d- *By severance.*§

REVELL V. SODRELL. E. T. 1788. K. B. 2 T. R. 415.

In this case the Court held, that by a grant of a manor with an extraction of

* But if the lord of a manor alien his wastes, although the copyholder's right is not gone, the commonable soil is divested from his person; 18 Ass. pl. 4. So where the commoners of a manor had a right in the king's waste in a forest, and also another right in the lands of freeholders, the manor came into the king's hands, and so an unity was perfected; it was resolved, that although the privilege in the waste was not extinct as to the copyholders, yet that as to the lord, it was; Sir Wm. Jones, 349.

† It may be, however, presumed, says Mr. Woolrych in his Treatise on Rights of Common, p. 149. both from the general principle of law, which is, that the law works not any injury to persons, as well as from collateral authorities, that a descent of lands uniting both rights, would not in any case operate to a destruction of those rights.

‡ In the case of Benson v. Chester, 8 T. R. 401. Ld. Kenyon is reported to have said, that although that might be the case, where the release is made by one commoner, if it were so, in consequence of a release by all the commoners, there would long ago have been an end of almost all rights of common, and he expressed a wish to examine into the point before he subscribed even to the former position.

§ As, for example, by a dissolution of the estate to which the common belongs, as of

the waste, they are thereby severed from the manor, though the copyholders [694] continue to have a right of common thereon by immemorial custom. See 4 Common East, 279; 2 M. & S. 175.

nant for cattle, *levant et couchant*. may also be extinguished by severance.*

4th. *By approvement.*†

Where the lord exercises his privilege of approving, the right of common is destroyed as to the part inclosed. The instances in which such partial extinguishment can exist have been already noticed; vide ante, p. 620.

5th. *By inclosures.*

GULLETT V. LOPES. H. T. 1811. K. B. 13 East, 348.

It appeared that the defendant, in an action of replevin, had inclosed part of his common, having, however, a drove or way open and uninclosed on one side of it, so that the cattle from an adjoining common, between which and the defendant's waste a common because of vicinage had subsisted, could stray through that opening into the other waste. The Court were of opinion that the vicinage was not excluded, and set aside an award in favor of the defendant as bad in law. See 13 H. 7. 13; 11 Mod. 72; Noy. Rep. 106; 1 Brownl. 174; 3 Keb. 24.

6th. *By enfranchisement.*‡

1. SPEAKER V. STYANT. T. T. 1688. K. B. Comb. 127.

monasteries or corporate bodies; or for instance by the disafforesting of forest woods, in which a right of common is claimable, &c.; see 27 H. 8. 10; 2 Ro. Rep. 251; 8 Rep. 136; Godb. 167. So where a person having common of this kind annexed to a messuage or tenement, conveys away the messuage or tenement, excepting the common, this will create an extinguishment of the common; 1 Roll. Ab. So it is said, that *long neglect of user* will operate to defeat a right of common, since it is gained only by long sufferance; Bract. 223; Brit. 144; 3 Leon. 202. An interruption of the rights for a few years, it would however seem, will not have the same effect; 5 Rep. 101; 3 Bl. Com. 221.

* So a common of estovers appendant or appurtenant will be utterly gone, if the owner destroys the house, i. e. alters the nature of the tenement to which either belong, for they will be thereby severed from the thing to which they are appendant. But a tenant will not lose his estovers by enlarging his house, or building new chimnies, or by the act of God, as by tempests, wildfire, &c. which may destroy his tenements, for the act of God prejudices not any man; 4 Rep. 86. But no act of the lord, independent of the commoner, can extinguish the commoner's right to take them; for where a manor was granted to A., with a reservation of the trees, &c. growing thereon, and A. granted a copyhold estate for life, it was held that such tenant might take the loppings in defiance of the reservation, and judgment was given for him in an action for trespass; 8 Rep. 63; 1 Brownl. 231; Hob. 43.

† By 15 Car. 2. c. 17. s. 38. it was enacted, that all lords of manors, their heirs and successors, and all persons having rights of common in the waste within Bedford level, might improve, set out, divide, and sever their respective proportions of common, and hold such proportions in severalty, at all times of the year. Several inclosures were made under this act, and as it appears, to the great impoverishment of the country; for, in the next reign, this obnoxious clause was in part repealed; the preamble of the new act stating, that great diminution of stock, and decay of houses, had taken place by reason that many persons had sold their shares of common from the houses to which they belonged, which led to a great increase of poverty; all future improvements under the act of Charles, were, therefore, prohibited; but those had already taken place were allowed to remain; (1 Jac. 2. c. 21. s. 4.) In a case where Ld. Harkwicke directed an issue at law to try the validity of a custom to dig turf in the lord's soil, he expressed an opinion, that if it should turn out that the lands had been severed from the manor, the tenants had been led into a mistake by imagining that they could take turf as well after the severance as before; 2 Atk. 189.

‡ As the estate is in such case no longer copyhold, or even held of the manor, all customs relative to copyholds within the manor must fail as to the premises enfranchised. Such commonage will not pass by the word "appurtenances" in the deed of enfranchisement. The right of commonage must be expressly conveyed as a new grant; though equity will, under certain circumstances, decree its continuance when it would be extinct at law. For where the lord of a manor enfranchised a copyhold with all common thereto belonging or appertaining, afterwards bought in all the copyholds, and then disputed the right of common with the copyholder he had enfranchised, and recovered against him; the Court decreed that he should hold and enjoy the same right of common which belonged to the copyhold; see Cro. Jac. 253. d; 2 Brownl. 209; 1 Brownl. 178, 220; 2 Ld. Raym. 1225; Salk. 170. 364; Moore, 667; Cro. Eliz. 570 794; 2 Vern. 250. It has been already, however, seen, *ante*, p. 692, that as long as the demisable property of the copyholds remains, the right of common incident thereto will continue, and when the copyhold lands are regranted the common will revive.

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So the com
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separation
from the
common
must be
complete.

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So, when the lord of a manor enfranchises his copyholder, having a right of common annexed to his customary estate, the tenant by accepting the feoffment loses his right.

But if he claim it in places without the precincts of the manor,

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it belongs to the land and not to the estate, in which case if he enfranchise the common will continue without words of regrant.

Trespass. Justification for right of common. The case appeared to be this a copyholder by inheritance, to which common belonged by custom, purchased the freehold by these words, "grant, bargain, and sell the said messuage with all the commons thereunto belonging." The point now before the Court was, whether, by the acceptance of the grant, &c. the common was extinct? if it was, whether it could not be revived without a special grant? The Court said; the common is extinct by the new purchase, and then the purchaser of the freehold cannot have it without a special grant *de novo*. See *Cro. Jac.* 253; *Yelv.* 189; 1 *Bulst.* 2; 1 *Brownl.* 220; 2 *id.* 209; *Noy. Rep.* 136; *Hob.* 190; *Gilb. Ten.* 191; *Dy.* 339.

2. *CROWTHER v. OLDFIELD.* H. T. 1705. K. B. 1 *Salk.* 170; S. C. 6 *Mod.* 19; S. C. but not S. P. 2 *Ld. Raym.* 1225. S. P. *FIELD v. BOOTH* BY, T. T. 1658. K. B. 2 *Sid.* 84.

Per Cur. A copyholder that has common of pasture in the wastes of the lord out of the manor, has the same as belonging to his land; and if he enfranchise the copyhold estate, still his common remains. In such case he must prescribe in the name of the lord, viz., that the lord of the manor, time out of mind, had common in such a place for himself and his customary tenants; but where a copyholder has common in the wastes within the manor, that belongs to his estate, and if the estate be enfranchised, the common is extinct. See *Co. Ent.* 9. 20

(B) AS TO THE SUSPENSION OF RIGHTS OF COMMON.*

It has been held, that where a person, having common appurtenant, takes a lease of part of the land, in which he has such right of common, all his common shall be suspended during the continuance of the lease; because it was the folly of the commoner to intermeddle with the land, over which he had a right of common; 8 *Rep.* 79. a.; 2 *Ro. Rep.* 345.

(C) AS TO THE REVIVAL OF RIGHTS OF COMMON.

In the consideration of when rights of common once extinguished or suspended will be revived, it will only be necessary to observe, that if a grant be made of all commons used or occupied with the land conveyed or leased, an extinguished right will revive; *Cro. Eliz.* 570. 594; 2 *And.* 168; 1 *Bulst.* 17. and when suspendend, will again take effect by the removal of the cause of such suspension; see *Godb.* 4; *Sir W. Jones*, 285.†

* If a commoner inclose part of the waste in which he feeds his cattle; 1 *Ro. Ab.* 938; or if he dissesies his lord; 16 *H.* 7. 11; *Bro. Com.* pl. 12: or if he be himself dissesied; 19 *H.* 6. 33; or where a unity of possession takes place, which does not extinguish the common by reason of the inequality of the estate; *ante*, p. 693; in all these cases the right of common will be suspended. So it seems, that under the statutes for preserving wood in the king's forests, the commoner may, by giving his assent to an inclosure of woods, occasion a suspension of his right during the time specified by the acts; see 22 *E.* 4. c. 7; 35 *H.* 8. c. 17. s. 7. 9; 13 *Eliz.* c. 25. s. 18; 8 *Rep.* 136; *Godb.* 167; 2 *Brownl.* 289, 322; 4 *Inst.* 304, 1 *Ro. Rep.* 92; *Sir W. Jones*, 235; so if he happen to transgress the forest laws; *Sir W. Jones*, 282.

† Thus in the case of *Bradshaw v. Eyre*, *Cro. Eliz.* 570. the Court held that the words of the lease, "all commons, profits, &c. occupied or used with the said messuage," &c. operate as a grant of a new right of common. For although it was not common in the purchaser's hands, yet it was *quasi* common, used therewith; and though not the same common was used before, yet it was the like common; see *Cro. Eliz.* 794. Where common appurtenant to a messuage was extinguished by unity of possession in the lord's hands; it was held that a grant by the lord of the messuage, with all common appurtenant, did not pass the common extinct. But that a grant of all commons usually occupied with the said messuage would have passed such common as the first was; 2 *And.* 168; *Moo.* 467; *Bulst.* 17. A revival will take place after an interruption of the right by the unity of the estate to which, &c. with the estate in which, &c. if the one be not of so perdurable a nature as the other, and become at any time severed. As if a parsonage having common appendant out of the lands of an abbot be appropriated to the abbacy, and be afterwards disappropriated; *Godb.* 4 *Anon. et ante*. p. 693. But this case only applies to appendant and appurtenant commons where they are apportionable, for where a person had common in gross, derived from the abbot of W., which was destroyed by unity of possession in the crown, with the lands in which the common was, and the crown granted the land to which the common belonged, with the words, *Tot, tanta, talia, libertatis, privilegia, et franchis, &c. quot, &c. aliquis, &c.*, it was resolved, that being common in gross it was not revived;

Common Bail.***I. IN THE KING'S BENCH.**

- (A) RELATIVE TO THE CASES WHERE COMMON BAIL IS NECESSARY, p. 697.
 (B) RELATIVE TO THE PERSONS FOR WHOM COMMON BAIL MAY BE FILED p. 697. [697]
 (C) RELATIVE TO THE TIME AND MODE OF FILING COMMON BAIL.
 (a) By defendant, p. 697. (b) By plaintiff, according to the statute, p. 699.
 (c) As to the penalty for not filing common bail, p. 700.
 (D) RELATIVE TO THE APPLICATION FOR DISCHARGING ON COMMON BAIL, p. 701.

II. IN THE EXCHEQUER, &c. p. 701.**III. OF THE ATTORNEY'S UNDERTAKING TO FILE COMMON BAIL, p. 701.****I. IN THE KING'S BENCH.****(A) RELATIVE TO THE CASES WHERE COMMON BAIL IS NECESSARY.**

1. It may be stated as a general rule, that wherever the defendant cannot be arrested, common bail will suffice. As to the cause of action for which a party may or may not be holden to special bail, see *ante*, vol. ii. from p. 280 to 294.

2. *KITCHING v. ALDER*. E. T. 1819. K. B. 1 Chit. Rep. 183.

On a rule to show cause why a bail-bond, &c. should not be set aside the Court said: if you apply for relief in a summary way, you must do so on equitable terms; the Court can only relieve the party on the condition of common bail being filed.

(B) RELATIVE TO THE PERSONS FOR WHOM COMMON BAIL MAY BE FILED.

Common bail may be filed for any person having legal capacity to contract; but it cannot be filed for an infant, under the statute, though he be sued jointly with other defendants; see 1 Tidd. 95. 8th ed. *post*. tit. "Infant."

(C) RELATIVE TO THE TIME AND MODE OF FILING COMMON BAIL.†**(a) By defendant.**

1. Where the defendant has been served with the copy of a bill of Middlesex, or other process thereon, he should file common bail at the return of it, or within eight days after such return; *Anon.* H. T. 1696. K. B. 5 Mod. Rep. 392; 5 Geo. 2 c. 271; which are reckoned exclusively, and Sunday is not reckoned as one of them, if it should happen to be the last; 1 Bur. 56.

2. *PRIGMORE v. BRADLEY*. E. T. 1805. K. B. 6 East, 314; S. C. 2 Smith, 405.

On a bill of Middlesex, returnable early in Michaelmas term, the defendant filed common bail after the essoign day of Hilary term, but before the first day in term, and it was contended that an appearance so entered could not be filed as of Michaelmas term preceding. *Per Cur.* The defendant is at liberty until the first day of full term to enter an appearance as of the preceding term.

3. *COULSEN v. SCOTT*. M. T. 1819. K. B. 1 Chit. Rep. 75.

In an action against husband and wife for the debt of the wife before marriage, the husband only being arrested, a motion was made for leave for the bail to justify for him alone. The Court held, that it was sufficient for the bail to justify for the husband only, but he must file common bail for his wife. See *ante*, vol. 4 p. 124 to 131.

for in that case every person who had any part of those lands should have as great common as the abbot had, and so the common would be infinitely surcharged; *W. Jones*, 285.

* Filing common bail is an act or proceeding in the King's Bench of the same meaning and effect as a common appearance in the Court of Common Pleas; see *ante*, vol. i. p. 724. n. 1. These bail are *nominal*, *John Doe* and *Richard Roe*.

† But this method of effecting an appearance is confined to proceedings by bill, for in K. B. when plaintiff proceeds by original, a common appearance is entered with the filazer.

‡ These bail are entered on a piece of parchment called a bail-piece, which was formerly stamped; but the 5 Geo. 4. repeals the duty imposed by the 55 Geo. 3. c. 184. The bail-piece is filed with the clerk of the common bails, who is required to mark the bail-pieces numerally as they are received; 3 T. R. 660. And at the time of filing common-bail, the defendant's attorney should deliver to the officer with whom it is filed a memorandum or minute of his warrant, which must formerly have been stamped.

Common bail must be filed where the defendant cannot be arrested,

Or where the Court directs it to be done on his discharge out of custody.†

Common bail should be filed within eight days after the return of the process.

[698] It may be filed after the essoign day, and before the first day in full term, as of the antecedent term.

In an action against husband and wife, where the former on arrest is arrested, bail may justify for him, on his filing common bail for his wife.

But when the husband alone has been served with a process, he ought to file common bail for both.

Though where he entered common bail for himself only, it was holden that the plaintiff could not sign judgment with out demanding plea.*

[699] Common bail for the defendant filed by the plaintiff. ought to be of the term in which the writ is returnable and not of the following term.

But it has been holden that it may be filed before the *quarto die post* of the first return of the following term, And in order to warrant a judgment on a *cognovit*, common bail may be And if the defendant be sued by a wrong name, and the plaintiff file common bail for him in his right name; Or if he file common bail for him in the name by which he is sued, and declare against him in his right name it is irregular.†

4. COLLINS V. SHAPLAND. E. T. 1738. C. P. Barnes, 412.

A rule to show cause why judgment should not be set aside, the wife having never been served with process, was discharged, the service of the husband being held sufficient to authorise the plaintiff entering common bail for himself and a wife.

5 CLARK V. NORRIT. E. T. 1789. C. P. 1 H. Bl. 235.

The defendant and his wife were joined in the writ; he entered an appearance for himself only: the plaintiff signed judgment without demanding a plea. On motion to set it aside, it was contended that the judgment was regular, inasmuch as the defendant ought to have entered common appearance for himself and his wife. But the Court held the judgment irregular, and that a demand of plea was necessary.

(b) By plaintiff according to the statute.

For the words of the statute, see *ante*, vol. 1. p. 725.

1. SMITH V. PAINTER. M. T. 1783. K. B. 2 T. R. 719.

Application to set aside a judgment. It appeared that the writ was returnable the 29th December, as of the first return of Hilary term. Notice of declaration was delivered on the 5th of May, as of Easter term; but common bail not being filed, the plaintiff filed it according to the statute on the 3d of June; and a rule to plead being given, the plaintiff signed judgment for want of a plea. But the Court said, the bail ought to have been filed in the term when the writ was returnable, and not in the term following.—Rule absolute.

Common bail for the defendant filed by the plaintiff. ought to be of the term in which the writ is returnable and not of the following term.

2. PRIGMORE V. BRADLEY. E. T. 1805. K. B. 2 Smith, 405; S. C. 6 East, 314.

The plaintiff proceeded by bill, returnable the first return of Michaelmas term; and the return was not entered till the 22d of January, after the essoign day of Hilary term, the day before the commencement of full term. On motion to set aside a judgment of *non pros* the question was, whether an appearance so entered could be filed as of Michaelmas term preceding? And the Court said, that until the commencement day of full term, the 23d of January, the party was at liberty to enter his appearance as of the antecedent term.

3. DAVIS V. HUGHES. E. T. 1797. K. B. 7 T. R. 206.

The writ was returnable in Trinity term, at which time the defendant gave a *cognovit*; but judgment had not been signed till Hilary term; after which, in the same term common bail was filed; this was contended to be irregular. But the Court said, the irregularity was waived by the *cognovit*; and that it was quite sufficient that judgment now appeared to have been regularly entered up; the plaintiff having since filed, common bail *nunc pro tunc*, for the defendant. filed of the term subsequent to that in which the writ is returnable *nunc pro tunc*.

4. DOO V. BUTCHER.—E. T. 1790 K. B. 3 T. R. 611.

On a rule to set aside proceedings, it appeared that the declaration was against the defendant, by the name of *Thomas*, and the writ *John*; to which it was replied, that as common bail was filed by the name of *Thomas*, his right name, no advantage could be taken. In support of the rule it was admitted, that as the plaintiff had filed common bail for defendant, according to the statute, it was competent to him to rectify the original mistake. And of that opinion were the Court.

5. DELANCY V. CANNON. M. T. 1808 K. B. 10 East, 327.

On a rule to set aside proceedings, it appeared that the writ had been sued out by the name of *John*, and common bail filed against him by the same name, and then the plaintiff declared against him by the name of *Robert*, his real name sued by the name of *John*. The Court held the proceedings irregular, and made the rule absolute.

* Yet in the case of *Russell v. Buchanan*, cited *Man, ex Addend. 625*; where an appearance was entered for the husband only, who disclaimed any interference, and an appearance was entered for the wife according to the statute; and the plaintiff suing them jointly, in his right the husband filed his plea only. The Exchequer refused to set aside a judgment signed for name it is want of a plea.

† But if the writ and declaration be against the defendant in his right name, common bail

The plaintiff having sued out a writ against four defendants, for separate causes of action, and filed separate declarations against three of them conditionally, and given three separate rules to plead, afterwards entered a common appearance, according to the statute, for all the three defendants jointly, and signed three separate interlocutory judgments for want of a plea. The Court held this to be irregular; for by declaring separately against the three defendants, the plaintiff had made three separate causes, and had thereby elected to proceed separately; and, by the practice of the Court, he ought to have entered a separate appearance for each of them.

7. **WANSEY V. MORE.** M. T. 1792. K. B. 5 T. R. 65.

On showing cause against a rule for setting aside interlocutory judgment, because it appeared to have been signed on the 2d of November, and common bail was not filed by the plaintiff till the 3d, it was sworn that the judgment was not in fact signed until after common bail was filed; and the Court, after consulting the master, said it was the established practice to sign judgment on the 2d November, before the *essoign* day, in all cases where common bail is filed between the 2d and 6th of November.

common bail for the defendant, between the 2d and 6th November, is entitled to judgment, it is signed as of the day before the *essoign* day (3d November,) of M. T.,⁺

(c) *As to the penalty for not filing common bail.*

WHITE V. HOLLAND. H. T. 1726. K. B. 2 Stra. 737.

In this case it was resolved, that the rule for the payment of 5*l.* for not filing common bail, according to the 9 & 10 W. 3. c. 25.† should be made absolute in the first instance, the words of the statute being, that the Court shall immediately award judgment, whereon the plaintiff may take out execution. See 5 Mod. 392.

(D) **RELATIVE TO THE APPLICATION FOR DISCHARGING ON COMMON BAIL.**

The defendant, when entitled to be discharged on common bail, must make an application to the Court, or a judge at chambers; see Tidd, 502. 7th ed.

II. IN THE EXCHEQUER, &c.

In the Exchequer the practice, as regards common bail, is the same as in the K. B., and in the Common Pleas there is no common bail, but a common appearance is entered; see *ante*, vol. 1. from 722 to 728.

III. OF THE ATTORNEY'S UNDERTAKING TO FILE COMMON BAIL.

See *ante*, vol. 1. from p. 727 to 728.

An attorney by not entering an appearance pursuant to his undertaking, renders himself liable to an attachment; see Mould v. Roberts, 4 D. & R. 719.

Common Council. See tit. *Corporation.*

Common Counts.

filed for him by the plaintiff according to the statute in a wrong name may be amended; Wheston v. Packman, 3 Wils. 49. abridged *ante*, vol. i. p. 726.

* By Reg. Gen. E. T. 1657, it is ordered, that all clerks, &c. do within 10 days after the end of every term, deliver to the secondary a note of all such appearances as have been made unto them before, and by whom they were made, so that the person appointed to enter the bails may see whether they are filed for every such appearance or not. And by Reg. Gen. 1736. 2. Stra. 1027. it is ordered, that in all cases where common bail shall be filed by the plaintiff for the defendant, by virtue of the act, these words shall be written on the bail piece, viz. *filed according to the statute*, or words to the like effect. And by 51 Geo. 3. c. 124. and 57 Geo. 3. c. 101. if the defendant, on being personally served with the summons or attachment by original, do not appear at the return of such writ, or of the *distringas*, as the case may be, or within eight days after the return thereof, the plaintiff upon affidavit being made and filed in proper court, of the personal service of such summons, or attachment, or of the due execution of such *distringas*, &c. may enter a common appearance for the defendant, and proceed thereon as if he had himself entered his appearance. And by the Mutiny Acts, a common appearance may be entered by the plaintiff in actions against volunteer soldiers; see 53 Geo. 3. c. 17.

† Which imposes that penalty for not filing common bail in time.

And where plaintiff is sued one writ against several defendants, and filed separate declarations, it was holden that he could not afterwards enter a joint appearance.

In all cases where the plaintiff has ving filed

The rule for the penalty of 5*l.* for not filing common bail in time is absolute in the first instance.

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See *tit.* Annuity, Arbitration and Award, Assumpsit, Bankrupt, Bills and Notes, Charter-party, Composition with Creditors, Contract, Contribution, Covenant, Declaration, Frauds, Statutes of, Goods sold and delivered, Guarantee, Insurance, Money lent, Money paid, Money had and received, Party-wall, School and Schoolmaster, Tolls, Wager, Warranty.

Common Informer. See *tit.* *Informer*; *Penal Actions*; *Qui tam Actions*.

Common Pleas. See *tit.* *Courts*.

[702]

The word, "his Majesty's Court of the Bench at Westminster," apply to the Court of Common Pleas, and do not describe the K. B.

IMFY V. TAYLOR. H. T. 1814. K. B. 3 M. & S. 166.

The question raised in this case was, whether an allegation that an action was depending in his Majesty's Court of the Bench at Westminster, was sustained by proof of a previous bill of Middlesex. The Court held it was not, as by such averment the common bench must be intended; observing, supposing the words "Court of the Bench" to be equivocal, the addition of "at Westminster," designates, by its locality, the Court of Common Bench: the Court to the Court of K. B. would have been, wheresoever, &c. See *Rex v. Lennard*, 1 Show. 302.

Common Pleas at Lancaster. See *tit.* *Courts*.

Common Recovery. See *tit.* *Fine and Recovery*.

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I. AS TO THE MODE OF SUING MEMBERS OF THE HOUSE OF COMMONS.

As the course which the plaintiff is to adopt on suing a member of the House of Commons is similar to that which is to be pursued on proceeding against a peer, in order to avoid unnecessary repetition, the cases on the subject will be collected under *tit.* *Parliament*.

II. PRIVILEGES OF MEMBERS OF THE HOUSE OF COMMONS.

(A) FROM BEING HOLDEN TO BAIL.

[703]

Members of the House of Commons are privileged from arrest except in cases of treason, felony, and actual breach of the peace.

1. THE KING V. JOHN WILKES, M. P. E. T. 1765. C. P. 2 Wils. 151.

On the arrest and commitment of John Wilkes to the Tower, under a general warrant of the Secretary of State, the Court, on the return to an *habeas corpus*, was moved that he might be discharged, on the ground that the defendant was a member of parliament, and entitled to privilege to be free from arrest in all cases except treason, felony, and actual breach of the peace, and that therefore he ought to be discharged from imprisonment without bail. *Per Cur.* We are all of opinion that the defendant is entitled to the privilege of exemption from arrest, and must be discharged without bail. In the case of the seven bishops, the Court took notice of the privilege of parliament, and thought the bishops would have been entitled to it, if they had not esteemed them to have been guilty of a breach of the peace, for three of the judges

deemed a seditious libel to be an actual breach of the peace, and therefore they were ousted of their privilege most unjustly. If the defendant had been described as a member of parliament in the return, we must have taken notice of the law relative to the privilege of parliament, and therefore we are bound to take notice of their privileges as being part of the law of the land. Lord Coke, in 4 Inst. 25. says, that the privilege of parliament holds unless it be in three cases, viz. treason, felony and the peace. These are his words, and in the trial of the seven bishops the word "peace," in the case of privilege, was explained to mean where surety of the peace is required. Privilege of parliament holds in informations for the king, unless in the cases before excepted; and the case of an information against Lord Tankerville for bribery, 4 Ann, was within the privilege of parliament; (see also the resolution of the lords and commons, anno 1675.) We are all of the opinion that a libel is not a breach of the peace; (*sed vide* Gow Rep. 84; S. C. 1 B. & B. 348; 4 B. Moore, 195;) it tends to the breach of the peace, and that is the utmost; but that which only tends to a breach of the peace cannot be a breach of it; Lev. 139. Suppose a libel to be a breach of the peace, yet it cannot exclude privilege; because we cannot find in any book whatever that a libeller is bound to find sureties of the peace, nor ever was in any case, except one, viz. the case of the seven bishops, where three of the judges said that surety of the peace was required in the case of a libel; but Judge Powell, the only honest man of the four, dissented, and we are bold to be of his opinion, and to say that case is not law; but it shows the miserable condition of the state at that time. Upon the whole, it is absurd to require surety of the peace, or bail, in the case of a libeller, and therefore the defendant must be discharged from his imprisonment. See Forts. 159; Ca. Temp. Hard. 28; 2 Lev. 72; 1 Dyer, 59. [704]

2. *HOLIDAY v. PITT*. E. T. 1734. K. B. Ca. Temp. Hard. 28; S. C. Com. 444; S. C. Forts. 159; 2 Stra. 985; S. C. 2 Barnard, 222.

This was a motion to discharge the defendant, John Pitt, Esq. out of custody, because he, having been member of Camelford in Cornwall in the late parliament, had been arrested by several writs of *capias* out of the C. P. and *latitans* out of the court of K. B. within three days after the prorogation, and two days after the dissolution of parliament, before the time of privilege, as he alleged, was out. He was likewise charged in custody with several declarations. The defendant removed himself into the K. B. by *habeas corpus*. Lord Hardwicke delivered it as in the unanimous opinion of the eleven judges, who were present at the arguments; that the defendant was entitled to the privilege of parliament; that it was not necessary in this case to determine to what time it was limited, or supposing it to be only for a convenient time, the defendant was arrested within that convenient time, he having been taken within three

* The exact period to be allowed, as an interval between the happening of either of these events, and the termination of the privilege, has never been by common law clearly limited or defined. The judges, from a desire not to interfere with such immunities, have scrupulously abstained, whenever the question has been agitated, from giving a direct adjudication on the subject. Indeed, the House of Commons itself has always, in this respect, avoided deciding the limits of their privilege. The generally received opinion, and the practice adopted and acted upon, appear to be, where the House is prorogued, to allow discharge 40 days before and 40 days after every session; Cotton's Records, 704; Elson Parl. 245; him on *mo Athol v. Derby*, 2 Lev. 72; *Holiday v. Pitt*. Ca. Temp. Hard. 28. 37; 2 Com. Rep. 444, *tho'* S. C.; Forts. 159. S. C.; *Jackson v. Kirton*, 1 Brownl. 91; 4 Bac. Abr. 238; 1 Blac. in some in Com. 165; *sed vide* Barnes v. Ward, Sid. 29: which is now in effect a total exemption stances from arrest, during the existence of the parliament to which the member was elected, as the they have prorogation of the House, according to the present usago, scarcely ever extends beyond 80 days at a time. him to pro

It is clear that the members enjoy this privilege after a dissolution, as well as after prorogation; that is, they are exempt from arrest for a convenient time before the first meeting, writ of privilege, after the final dissolution of the parliament, to enable them to come from and return to any part of the kingdom; Scobell, 88. 108; *Holiday v. Pitt*; Ca. Temp. Hard. 28. 37; 2 Com. Rep. 446 S. C.; 2 Stra. 985. C. C.; see 6 H. 8. c. 16; 34 & 35 H. 8. c. 43; and 35 H. 8. c. 11. 12.; and 13 W. 3. c. 3. The period allotted for the duration of the privilege, *cundo et redeundo*, has not been distinctly defined, nor can its probable limits be suggested, or illustrated by numerous decisions. In the principal case on the subject, *Holiday v.*

[705] days after the prorogation, and two days after the dissolution of parliament and that consequently his person ought to be discharged in a proper and legal manner, but that the remaining question is, what is that proper and legal method, whether by writ of privilege, under the great seal on record, or whether it may be done by motion on affidavit? As to this point, the judges were all of opinion, that a writ of privilege is a proper method to be taken for the discharge of the defendant's person, but there was a great doubt and some variety of opinion amongst them, whether the court would discharge him in the method now taken on motion or not, no case having been produced from the books, wherein any person entitled to the privilege of parliament was discharged after this manner. But it being a matter of consequence, and the short time between the arguments, and the last day of the term, being taken up in necessary business, the court was of opinion to enlarge the rule till next term, without prejudice to the defendant's bringing his writ of privilege; and if the defendant does not think fit to bring his writ of privilege in the mean time, but insists on the method already taken, they will then give their opinion on the matter, after having given it the consideration it will require, it being altogether a new proceeding. The judges were afterwards of opinion that the defendant should be discharged on motion.

3. FENWICK V. FENWICK. M. T. 1771. C. P. 2 Black. 788.

On motion for a member's discharge, the production of the writ of election is requisite.

The defendant, who was member for the county of W was bound in a bond of 18,000*l.* to the plaintiff, the widow of his elder brother, to pay her 8000*l.* in money, and an annuity for life of 400*l.* per annum. On default of payment, she brought an action of debt on the bond and recovered judgment, and sued out an *exigi* thereon, which was not executed. For, finding he had cash in the hands of Child and Company, bankers in London, she brought a plaint upon the judgment, in the Mayor's Court, and sued a foreign attachment against the money in Child's hands: to which, the defendant put in special bail, and thereby discharged the attachment; see Cro. Eliz. 593. 713. The defendant then removed the plaint by *habeas corpus cum causa*, into this Court; and, upon a rule given by the plaintiff for that purpose, put in special bail upon the *habeas corpus*. It was then moved, that the defendant, being a member of parliament, might be discharged on common bail. But this being only proved by affidavit, the Court, on consideration of precedents, would not grant a rule to show cause; but the next day the deputy-clerk of the crown attended with the sheriff's return; when they ordered the rule to go. See 1 Dy. 596.

(B. FROM BEING ATTACHED.

CATMUR V. KNATCHBALL. M. T. 1797. K. B. 7 T. R. 448.

No attachment lies against a member of parliament for non-payment of money.

On a rule to show cause why an attachment should not be granted against the defendant, who was a member of parliament, for non-payment of money Pitt, *supra*, 704, and see Jackson v. Kirtton, 1 Brownl. 91; Ra. Ent. 664; 35 Hen. 6. c. 11: Atkins, Power of Parliament, 38. 44. The parliament was prorogued on the 16th of April, dissolved on the 17th, and the new writs bore teste on the 18th following, and the defendant was holden to bail on the 20th. Id. Harkwicke, C. J. we have seen (*supra*) delivered it as the unanimous opinion of the judges who were present at the argument, that the defendant was entitled to the privilege of parliament *redeundo*, and that it was not necessary in that case to determine to what time it was limited; for supposing it to be only for a convenient time, he having been taken within three days after the prorogation, and two days after the dissolution of the parliament; and that, consequently his person ought to be discharged. It is conceived, that if this important question should be again agitated, that the courts would probably determine it with reference to the practice adopted in the analogous case of a prorogation, and extend it to an interval of 40 days before and subsequent to the final dissolution. Indeed this conjecture appears to be authorized and directly sanctioned by an event related in Scobell (Scobell's Memorial, 108, 108) to have occurred in 1586, when Mr. Martin, a member of the House of Commons, was arrested 20 days before the meeting of parliament. The house ordered him to be discharged, but when the question was put whether they should limit a term for the continuance of this privilege, the proposition was negatived. From this resolution it is clear, that 20 days is not too protracted an interval, and it may not be superfluous to remark, that in the principal case before alluded to, the defendant had resided for one year previous to his arrest in the neighbourhood of London.

Nor for the non-performance of an award; see 7 T. R. 171.

pursuant to an award, it was admitted by counsel on both sides, and ruled by the Court, that it would not lie. [706]

(C) FROM BEING TAKEN IN EXECUTION.

Members of the House of Commons cannot be taken in execution; see 1 Crompt, Prac. 345.

III. DISABILITIES OF MEMBERS OF THE HOUSE OF COMMONS.

Members of the House of Commons are ineligible as bail; *Deccan v. Hall*, 1 D. & R. 126; *Graham v. Sturt*, 4 Taunt. 248; abridged ante, vol. 3. p. 99.

IV. RELATIVE TO THE PRIVILEGES OF THE SERVANTS OF MEMBERS OF THE HOUSE OF COMMONS.

At common law the servants of members of the House of Commons were exempt from being holden to bail; see 4 Bac. Ab. 230. but this privilege appears to be taken away by the provisions of the 10 Geo. 3. c. 50; see *Connelly v. Smith*, 1 Chit. Rep. 83.

COMMUNION TABLE. See tit. *Churches and Chapels.*

COMMUTATION. See tit. *Panishment.*

COMPANIES See tit. *Corporation.*

COMPARISON OF HANDS. See tit. *Evidence.*

COMPASSING. See tit. *Treason.*

COMPENSATION. See tit. *Damages; London Dock Act.*

BINGHAM V. SERLE. M T. 1804. K. B. 5 East. 534; S. C. 2 Smith's Rep. 129.

A verdict had been in this case found for the plaintiff, subject to the opinion of the Court. The plaintiff is the incumbent of it; and the person whose name is mentioned in the warrant and inquisition hereafter set forth; the defendant is the receiver-general of the land-tax for the county of B. It appeared that on the 18th day of Nov. 1803, a warrant was issued by two of his majesty's lieutenant's for the said county, directed to the sheriff, the purport of which was, that whereas his majesty had authorised his master-general and principal officers of his majesty's ordinance to survey and make out the piece or parcel of land or ground situate at or near G., holden by A. B. under lease from K. L. and whereas they, the undersigned, the two said deputy-lieutenants of the county of B. had, pursuant to the statute in such case made and provided, issued their warrants under their hands and seals commanding possession of the said premises to be delivered to C. D., the commanding royal engineer at Portsmouth for the public service; the said sheriff was required to summon a jury to appear, and be at the Crown Inn, at G., on, &c. at G., &c. to inquire of and ascertain the compensation which ought to be made for the possession or use of all and every before-mentioned premises, during the time for which the same should be required for the public service, to the several persons interested therein, and to whom the same ought to be paid. It also appeared that in pursuance of the said warrant, the following inquisition was taken on the day, at the place, and by the jurors therein named, by which the said A. B. was holden, certifying to receive the sum of 14,000*l.* as a compensation for his damages by reason of giving up the premises therein mentioned, to be required from him for the exigency of government, during the time the same should be so required. The Court were now called upon to decide whether the plaintiff was entitled to recover. The objections taken on the part of the defendant were commented upon by the Court in delivering judgment as follows: Three objections have been made to the plaintiff's right to recover in this action. 1st. That a gross sum, as this appears to be, cannot in its nature be a proper compensation for the possession which government is to have of this land for a period of uncertain duration. 2d. That all the proper parties were not before the jury. 3d. That it is uncertain, on the face of the inquisition, what interest the public are to take in the premises in respect of which the compensation is awarded. The right of the plaintiff to recover merely

On an inquisition taken as damages to the proprietors for the possession of lands, &c. taken for the use of government, under the 48 Geo. 3. a compensation in a gross sum cannot be awarded, but it must be by an annual compensation in the way of rent, to be paid to the persons entitled to the land, and the inquisition will be bad if all the parties interested are not summoned and properly compensated.

rate such an unity of possession as will extinguish a right of common,

[693] the person must have an estate in the lands to which the common is annexed, and in those where the right of common exists, equal in duration.

When therefore a copyholder had a right of common in an adjoining manor *qua* copyholder, and he purchased that manor, the right was considered as still in existence.†

Every right of common may be extinguished by release of it to the owner of the soil, and a release of one acre will operate as an entire extinguishment of the whole right.‡

lord by forfeiture, the right of common became extinguished, and the regrant of it as a copyhold tenement, *cum pertinentiis*, did not recreate the right of common. A verdict was found for the plaintiff. A motion was now made to enter a nonsuit, which the Court refused to listen to: observing, when a copyhold tenement is seised into the hands of the lord, it does not therefore lose its right of common; for that right is annexed to all customary tenements demised or demisable by copy of Court roll; and while the estate remains in the lord it continues demisable. If, indeed, the lord grants the fee to a copyholder, it never can again become a copyhold estate, for it ceases to be demisable by court roll; as the case however stands, the rule must be refused.* See *Yelv.* 189; *Ow.* 122; *Poph.* 172; 2 *Brownl.* 47; 6 *Mod.* 20.

3. *REX V. HERMITAGE.* E. T. 1691. K. B. Carth. 241.

A right of common was appendant to certain tenements, which were parcel of the Abbey of Sarum in a common that was parcel of the duchy of Cornwall. Upon the dissolution of the Abbey of Sarum, these tenements became vested in king Henry 8. in fee, in whom the duchy of Cornwall was then vested, for want of a duke of Cornwall. Lord Holt, and the rest of the judges resolved, that this was not such an unity of possession as would destroy the right of common, because king Henry 8. had not as perdurable an estate in the one as in the other, for in the duchy of Cornwall the king had only a fee, determinable on the birth of a duke of Cornwall, which was a base fee; but in the tenements in question he had a pure fee simple, indeterminable, *jure coronæ*. See *Godb.* 4.

4. *REVELL V. SODRELL.* E. T. 1788. K. B. 2 T. R. 421.

It was argued by counsel in this case that a copyholder might, as such, have a right of common in an adjoining manor; but it could never be contended that by purchasing that manor he would extinguish forever the right of common incident to his copyhold, because that would injure the lord. The Court afterwards, in giving judgment on the particular facts of the case, did not controvert the propriety of such argument.

2d. *By release.*

MILES V. ETERIDGE. E. T. 1692 K. B. 1 Show. 358; 1 *Keb.* 499.

Trespass for throwing down fences; the defendant justified as a commoner. The plaintiff replied, that the defendant's father, under whom he claims, did give license for to make and continue the inclosure to him and his heirs, and issue was joined thereon, *utrum licentiavit modo et forma*. There was a verdict for the plaintiff. A motion was made in arrest of judgment, on the ground that this was an immaterial issue. *Per. Cur.* The Court took time to consider, but in the interim made of these expressions: it is ill by way of licence, but it is good by way of release of common; but a licence is determined by his death. A release of common in one acre is an extinguishment of the whole common.

3d- *By severance.*§

REVELL V. SODRELL. E. T. 1788. K. B. 2 T. R. 415.

In this case the Court held. that by a grant of a manor with an extraction of

* But if the lord of a manor alien his wastes, although the copyholder's right is not gone, the commonable soil is divested from his person; 18 *Ass.* pl. 4. So where the commoners of a manor had a right in the king's waste in a forest, and also another right in the lands of freeholders, the manor came into the king's hands, and so an unity was perfected; it was resolved, that although the privilege in the waste was not extinct as to the copyholders, yet that as to the lord, it was; *Sir Wm. Jones*, 349.

† It may be, however, presumed, says *Mr. Woolrych* in his *Treatise on Rights of Common*, p. 149. both from the general principle of law, which is, that the law works not any injury to persons, as well as from collateral authorities, that a descent of lands uniting both rights, would not in any case operate to a destruction of those rights.

‡ In the case of *Benson v. Chester*, 8 T. R. 401. *Ld. Kenyon* is reported to have said, that although that might be the case, where the release is made by one commoner, if it were so, in consequence of a release by all the commoners, there would long ago have been an end of almost all rights of common, and he expressed a wish to examine into the point before he subscribed even to the former position.

§ As, for example, by a dissolution of the estate to which the common belongs, as of

the waste, they are thereby severed from the manor, though the copyholders [694] continue to have a right of common thereon by immemorial custom. See 4 Common East, 279. 2 M. & S. 175. Common
appendant
or appurte

nant for cattle, *levant et couchant*. may also be extinguished by severance.*

4th. *By approvement.*†

Where the lord exercises his privilege of approving, the right of common is destroyed as to the part inclosed. The instances in which such partial extinguishment can exist have been already noticed; vide ante, p. 620. So the com
mon may
be extin
guished in
part by ap
provement;

5th. *By inclosures.*

GULLETT V. LOPES. H. T. 1811. K. B. 13 East, 348.

It appeared that the defendant, in an action of replevin, had inclosed part of his common, having, however, a drove or way open and uninclosed on one side of it, so that the cattle from an adjoining common, between which and the defendant's waste a common because of vicinage had subsisted, could stray through that opening into the other waste. The Court were of opinion that the vicinage was not excluded, and set aside an award in favor of the defendant as bad in law. See 13 H. 7. 13; 11 Mod. 72; Noy. Rep. 106; 1 Brownl. 174; 3 Keb. 24. Or inclo
sures on the
part of the
lord; but in
order to neu
tralize the
original
right, the
separation
from the
common
must be
complete.

6th. *By enfranchisement.*‡

1. SPEAKER V. STYANT. T. T. 1688. K. B. Comb. 127.

monasteries or corporate bodies; or for instance by the disafforesting of forest woods, in which a right of common is claimable, &c.; see 27 H. 8. 10; 2 Ro. Rep. 251; 8 Rep. 136; Godb. 167. So where a person having common of this kind annexed to a messuage or tenement, conveys away the messuage or tenement, excepting the common, this will create an extinguishment of the common; 1 Roll. Ab. So it is said, that *long neglect of user* will operate to defeat a right of common, since it is gained only by long sufferance; Bract. 223; Brit. 144; 3 Leon. 202. An interruption of the rights for a few years, it would however seem, will not have the same effect; 5 Rep. 101; 3 Bl. Com. 221.

* So a common of estovers appendant or appurtenant will be utterly gone, if the owner destroys the house, i. e. alters the nature of the tenement to which either belong, for they will be thereby severed from the thing to which they are appendant. But a tenant will not lose his estovers by enlarging his house, or building new chimnies, or by the act of God, as by tempests, wildfire, &c. which may destroy his tenements, for the act of God prejudices not any man; 4 Rep. 86. But no act of the lord, independent of the commoner, can extinguish the commoner's right to take them; for where a manor was granted to A., with a reservation of the trees, &c. growing thereon, and A. granted a copyhold estate for life, it was holden that such tenant might take the loppings in defiance of the reservation, and judgment was given for him in an action for trespass; 8 Rep. 63; 1 Brownl. 231; Hob. 43.

† By 15 Car. 2. c. 17. s. 38. it was enacted, that all lords of manors, their heirs and successors, and all persons having rights of common in the waste within Bedford level, might improve, set out, divide, and sever their respective proportions of common, and hold such proportions in severalty, at all times of the year. Several inclosures were made under this act, and as it appears, to the great impoverishment of the country; for, in the next reign, this obnoxious clause was in part repealed; the preamble of the new act stating, that great diminution of stock, and decay of houses, had taken place by reason that many persons had sold their shares of common from the houses to which they belonged, which led to a great increase of poverty; all future improvements under the act of Charles, were, therefore, prohibited; but those had already taken place were allowed to remain; (1 Jac. 2. c. 21. s. 4.) In a case where Ld. Harkwicke directed an issue at law to try the validity of a custom to dig turf in the lord's soil, he expressed an opinion, that if it should turn out that the lands had been severed from the manor, the tenants had been led into a mistake by imagining that they could take turf as well after the severance as before; 2 Atk. 189.

‡ As the estate is in such case no longer copyhold, or even held of the manor, all customs relative to copyholds within the manor must fail as to the premises enfranchised. Such commonage will not pass by the word "appurtenances" in the deed of enfranchisement. The right of commonage must be expressly conveyed as a new grant; though equity will, under certain circumstances, decree its continuance when it would be extinct at law. For where the lord of a manor enfranchised a copyhold with all common thereto belonging or appertaining, afterwards bought in all the copyholds, and then disputed the right of common with the copyholder he had enfranchised, and recovered against him; the Court decreed that he should hold and enjoy the same right of common which belonged to the copyhold; see Cro. Jac. 253. d; 2 Brownl. 209; 1 Brownl. 178. 220; 2 Ld. Raym. 1225; Salk. 170. 364; Moore, 667; Cro. Eliz. 570. 794; 2 Vern. 250. It has been already, however, seen, ante, p. 692. that as long as the demisable property of the copyholds remains, the right of common incident thereto will continue, and when the copyhold lands are regranted the common will revive.

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So, when the lord of a manor en franchises his copyholder, having a right of common annexed to his customary estate, the tenant by accepting thereof loses his right.

But if he claim it in places with out the precincts of the manor,

[696]

it belongs to the land and not to the estate, in which case if he enfranchise the common will continue without words of re grant.

Trespass. Justification for right of common. The case appeared to be this a copyholder by inheritance, to which common belonged by custom, purchased the freehold by these words, "grant, bargain, and sell the said message with all the commons thereunto belonging." The point now before the Court was, whether, by the acceptance of the grant, &c. the common was extinct? if it was, whether it could not be revived without a special grant? The Court said; the common is extinct by the new purchase, and then the purchaser of the freehold cannot have it without a special grant *de novo*. See Cro. Jac. 253; Yelv. 189; 1 Bulst. 2; 1 Brownl. 220; 2 id. 209; Noy. Rep. 136; Hob. 190; Gilb. Ten. 191; Dy 339.

2. **CROWTHER v. OLDFIELD.** H. T. 1705. K. B. 1 Salk. 170; S. C. 6 Mod. 19; S. C. but not S. P. 2 Ld. Raym. 1225. S. P. **FIELD v. BOOTHBY,** T. T. 1658. K. B. 2 Sid. 84.

Per Cur. A copyholder that has common of pasture in the wastes of the lord out of the manor, has the same as belonging to his land; and if he enfranchise the copyhold estate, still his common remains. In such case he must prescribe in the name of the lord, viz., that the lord of the manor, time out of mind, had common in such a place for himself and his customary tenants; but where a copyholder has common in the wastes within the manor, that belongs to his estate, and if the estate be enfranchised, the common is extinct. See Co. Ent. 9. 20

(B) AS TO THE SUSPENSION OF RIGHTS OF COMMON.*

It has been held, that where a person, having common appurtenant, takes a lease of part of the land, in which he has such right of common, all his common shall be suspended during the continuance of the lease; because it was the folly of the commoner to intermeddle with the land, over which he had a right of common; 8 Rep. 79. a.; 2 Ro. Rep. 345.

(C) AS TO THE REVIVAL OF RIGHTS OF COMMON.

In the consideration of when rights of common once extinguished or suspended will be revived, it will only be necessary to observe, that if a grant be made of all commons used or occupied with the land conveyed or leased, an extinguished right will revive; Cro. Eliz. 570. 594; 2 And. 168; 1 Bulst. 17. and when suspendend, will again take effect by the removal of the cause of such suspension; see Godb. 4. Sir W. Jones, 285.†

* If a commoner inclose part of the waste in which he feeds his cattle; 1 Ro. Ab. 938; or if he disseises his lord; 16 H. 7. 11; Bro. Com. pl. 12; or if he be himself disseised; 19 H. 6. 33; or where a unity of possession takes place, which does not extinguish the common by reason of the inequality of the estate; *ante*, p. 693; in all these cases the right of common will be suspended. So it seems, that under the statutes for preserving wood in the king's forests, the commoner may, by giving his assent to an inclosure of woods, occasion a suspension of his right during the time specified by the acts; see 22 E. 4. c. 7; 35 H. 8. c. 17. s. 7. 9; 13 Eliz. c. 25. s. 18; 8 Rep. 136; Godb. 167; 2 Brownl. 289. 322; 4 Inst. 304. 1 Ro. Rep. 92; Sir W. Jones, 235; so if he happen to transgress the forest laws; Sir W. Jones, 282.

† Thus in the case of Bradshaw v. Eyre, Cro. Eliz. 570. the Court held that the words of the lease, "all commons, profits, &c. occupied or used with the said message," &c. operate as a grant of a new right of common. For although it was not common in the purchaser's hands, yet it was *quasi* common, used therewith; and though not the same common was used before, yet it was the like common; see Cro. Eliz. 794. Where common appurtenant to a message was extinguished by unity of possession in the lord's hands; it was held that a grant by the lord of the message, with all common appurtenant, did not pass the common extinct. But that a grant of all commons usually occupied with the said message would have passed such common as the first was; 2 And. 168; Moo. 467; Bulst. 17. A revival will take place after an interruption of the right by the unity of the estate to which, &c. with the estate in which, &c. if the one be not of so perdurable a nature as the other, and become at any time severed. As if a parsonage having common appendant out of the lands of an abbot be appropriated to the abbacy, and be afterwards disappropriated; Godb. 4 Anon. *et ante*. p. 693. But this case only applies to appendant and appurtenant commons where they are apportionable, for where a person had common in gross, derived from the abbot of W., which was destroyed by unity of possession in the crown, with the lands in which the common was, and the crown granted the land to which the common belonged, with the words, *Tot, tanta, talia, libertatis, privilegia, et franchis, &c. quot, &c. aliquis, &c.*, it was resolved, that being common in gross it was not revived;

I. IN THE KING'S BENCH.

- (A) RELATIVE TO THE CASES WHERE COMMON BAIL IS NECESSARY, p. 697.
 (B) RELATIVE TO THE PERSONS FOR WHOM COMMON BAIL MAY BE FILED p. 697. [697]
 (C) RELATIVE TO THE TIME AND MODE OF FILING COMMON BAIL.
 (a) By defendant, p. 697. (b) By plaintiff, according to the statute, p. 699.
 (c) As to the penalty for not filing common bail, p. 700.
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II. IN THE EXCHEQUER, &c. p. 701.

III. OF THE ATTORNEY'S UNDERTAKING TO FILE COMMON BAIL, p. 701.

I. IN THE KING'S BENCH.

(A) RELATIVE TO THE CASES WHERE COMMON BAIL IS NECESSARY.

1. It may be stated as a general rule, that wherever the defendant cannot be arrested, common bail will suffice. As to the cause of action for which a party may or may not be holden to special bail, see *ante*, vol. ii. from p. 280 to 294.

2. KITCHING v. ALDER. E. T. 1819. K. B. 1 Chit. Rep. 183.

On a rule to show cause why a bail-bond, &c. should not be set aside the Court said: if you apply for relief in a summary way, you must do so on equitable terms; the Court can only relieve the party on the condition of common bail being filed.

(B) RELATIVE TO THE PERSONS FOR WHOM COMMON BAIL MAY BE FILED.

Common bail may be filed for any person having legal capacity to contract; but it cannot be filed for an infant, under the statute, though he be sued jointly with other defendants; see 1 Tidd. 95. 8th ed. *post*. tit. "Infant."

(C) RELATIVE TO THE TIME AND MODE OF FILING COMMON BAIL.†

(a) By defendant.

1. Where the defendant has been served with the copy of a bill of Middlesex, or other process thereon, he should file common bail at the return of it, or within eight days after such return; Anon. H. T. 1696. K. B. 5 Mod. Rep. 392; 5 Geo. 2 c. 271; which are reckoned exclusively, and Sunday is not reckoned as one of them, if it should happen to be the last; 1 Bur. 56.

2. PRIGMORE v. BRADLEY. E. T. 1805. K. B. 6 East, 314; S. C. 2 Smith, 405.

On a bill of Middlesex, returnable early in Michaelmas term, the defendant filed common bail after the *essoign* day of Hilary term, but before the first day in term, and it was contended that an appearance so entered could not be filed as of Michaelmas term preceding. *Per Cur.* The defendant is at liberty until the first day of full term to enter an appearance as of the preceding term.

3. COULSEN v. SCOTT. M. T. 1819. K. B. 1 Chit. Rep. 75.

In an action against husband and wife for the debt of the wife before marriage, the husband only being arrested, a motion was made for leave for the bail to justify for him alone. The Court held, that it was sufficient for the bail to justify for the husband only, but he must file common bail for his wife. See *ante*, vol. 4 p. 124 to 131.

for in that case every person who had any part of those lands should have as great common as the abbot had, and so the common would be infinitely surcharged; W. Jones, 285.

* Filing common bail is an act or proceeding in the King's Bench of the same meaning and effect as a common appearance in the Court of Common Pleas; see *ante*, vol. i. p. 724. n. I. These bail are *nominal*, John Doe and Richard Roe.

† But this method of effecting an appearance is confined to proceedings by bill, for in K. B. when plaintiff proceeds by original, a common appearance is entered with the filazer.

‡ These bail are entered on a piece of parchment called a bail-piece, which was formerly stamped; but the 5 Geo. 4. repeals the duty imposed by the 55 Geo. 3. c. 184. The bail-piece is filed with the clerk of the common bails, who is required to mark the bail-pieces numerally as they are received; 3 T. R. 660. And at the time of filing common-bail, the defendant's attorney should deliver to the officer with whom it is filed a memorandum or minute of his warrant, which must formerly have been stamped.

Common bail must be filed where the defendant cannot be arrested,

Or where the Court directs it to be done on his discharge out of custody.

Common bail should be filed within eight days after the return of the process.

[698] It may be filed after the *essoign* day, and before the first day in full term, as of the antecedent term.

In an action against husband and wife, where the former only is arrested, bail may justify for him, on his filing common bail for his wife.

But when the husband alone has been served with a process, he ought to file common bail for both.

Though where he entered common bail for himself only, it was holden that the plaintiff could not sign judgment with out demand of plea.*

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Common bail for the

But it has been holden that it may be filed before the *quarto die post* of the first return of the following term,

And in order to warrant a judgment on a *cognovit*, common bail may be filed if the defendant be sued by a wrong name, and the plaintiff file common bail for him in his right name;

Or if he file common bail for him in the name by which

he is sued, and declare against him in his right name it is irregular.†

4. COLLINS v. SHAPLAND. E. T. 1738. C. P. Barnes, 412.

A rule to show cause why judgment should not be set aside, the wife having never been served with process, was discharged, the service of the husband being held sufficient to authorise the plaintiff entering common bail for himself and a wife.

5 CLARK v. NORRIT. E. T. 1789. C. P. 1 H. Bl. 235.

The defendant and his wife were joined in the writ; he entered an appearance for himself only: the plaintiff signed judgment without demanding a plea. On motion to set it aside, it was contended that the judgment was regular, inasmuch as the defendant ought to have entered common appearance for himself and his wife. But the Court held the judgment irregular, and that a demand of plea was necessary.

(b) By plaintiff according to the statute.

For the words of the statute, see *ante*, vol. 1. p. 725.

1. SMITH v. PAINTER. M. T. 1788. K. B. 2 T. R. 719.

Application to set aside a judgment. It appeared that the writ was returnable the 29th December, as of the first return of Hilary term. Notice of declaration was delivered on the 5th of May, as of Easter term; but common bail not being filed, the plaintiff filed it according to the statute on the 3d of June; and a rule to plead being given, the plaintiff signed judgment for want of a plea. But the Court said, the bail ought to have been filed in the term when the writ was returnable, and not in the term following.—Rule absolute.

defendant filed by the plaintiff, ought to be of the term in which the writ is returnable and not of the following term.

2. PRIGMORE v. BRADLEY. E. T. 1805. K. B. 2 Smith, 405; S. C. 6 East, 314.

The plaintiff proceeded by bill, returnable the first return of Michaelmas term; and the return was not entered till the 22d of January, after the essoign day of Hilary term, the day before the commencement of full term. On motion to set aside a judgment of *non pros* the question was, whether an appearance so entered could be filed as of Michaelmas term preceding? And the Court said, that until the commencement day of full term, the 23d of January, the party was at liberty to enter his appearance as of the antecedent term.

3. DAVIS v. HUGHES. E. T. 1797. K. B. 7 T. R. 206.

The writ was returnable in Trinity term, at which time the defendant gave a *cognovit*; but judgment had not been signed till Hilary term; after which, in the same term common bail was filed; this was contended to be irregular. But the Court said, the irregularity was waived by the *cognovit*; and that it was quite sufficient that judgment now appeared to have been regularly entered up; the plaintiff having since filed, common bail *nunc pro tunc*, for the defendant. filed of the term subsequent to that in which the writ is returnable *nunc pro tunc*.

4. DOO v. BUTCHER.—E. T. 1790. K. B. 3 T. R. 611.

On a rule to set aside proceedings, it appeared that the declaration was against the defendant, by the name of *Thomas*, and the writ *John*; to which it was replied, that as common bail was filed by the name of *Thomas*, his right name, no advantage could be taken. In support of the rule it was admitted, that as the plaintiff had filed common bail for defendant, according to the statute, it was competent to him to rectify the original mistake. And of that opinion were the Court.

5. DELANCY v. CANNON. M. T. 1808. K. B. 10 East, 327.

On a rule to set aside proceedings, it appeared that the writ had been sued out by the name of *John*, and common bail filed against him by the same name, and then the plaintiff declared against him by the name of *Robert*, his real name sued by the name of *John*. The Court held the proceedings irregular, and made the rule absolute.

* Yet in the case of *Russell v. Buchanan*, cited *Man, ex Addend. 625*; where an appearance was entered for the husband only, who disclaimed any interference, and an appearance was entered for the wife according to the statute; and the plaintiff suing them jointly, the husband filed his plea only. The Exchequer refused to set aside a judgment signed for want of a plea.

† But if the writ and declaration be against the defendant in his right name, common bail

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See tits. Annuity, Arbitration and Award, Assumpsit, Bankrupt, Bills and Notes, Charter-party, Composition with Creditors, Contract, Contribution, Covenant, Declaration, Frauds, Statutes of, Goods sold and delivered, Guarantee, Insurance, Money lent, Money paid, Money had and received, Party-wall, School and Schoolmaster, Tolls, Wager, Warranty.

Common Informer. See tits. *Informer*; *Penal Actions*; *Qui tam Actions*.

Common Pleas. See tit. *Courts*.

IMPY V. TAYLOR. H. T. 1814. K. B. 3 M. & S. 166.

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The word, "his Majesty's Court of the Bench at Westminster," apply to the Court of Common Pleas, and do not describe the K. B.

The question raised in this case was, whether an allegation that an action was depending in his Majesty's Court of the Bench at Westminster, was sustained by proof of a previous bill of Middlesex. The Court held it was not, as by such averment the common bench must be intended; observing, supposing the words "Court of the Bench" to be equivocal, the addition of "at Westminster," designates, by its locality, the Court of Common Bench: the Court of K. B. would have been, wheresoever, &c. See *Rex v. Lennard*, 1 Show. 302.

Common Pleas at Lancaster. See tits. *Courts*.

Common Recovery. See tits. *Fine and Recovery*.

Common Scold. See tits. *Barrestrey*. *Scold*, *Slander*.

COMMONS, HOUSE OF. See tits. *Bankrupt*, *Election*, *Hustings*, *Parliament*.

I. AS TO THE COMMON MODE OF SUING MEMBERS OF THE HOUSE OF COMMONS, 702.

II. PRIVILEGES OF MEMBERS OF THE HOUSE OF COMMONS.

(A) FROM BEING HOLDEN TO BAIL, p. 703.

(B) ——— ATTACHED, p. 705.

(C) ——— TAKEN IN EXECUTION, p. 706.

III. DISABILITIES OF MEMBERS OF THE HOUSE OF COMMONS, p. 706.

IV. RELATIVE TO THE PRIVILEGES OF THE SERVANTS OF THE HOUSE OF COMMONS, p. 706.

I. AS TO THE MODE OF SUING MEMBERS OF THE HOUSE OF COMMONS.

As the course which the plaintiff is to adopt on suing a member of the House of Commons is similar to that which is to be pursued on proceeding against a peer, in order to avoid unnecessary repetition, the cases on the subject will be collected under tit. *Parliament*.

II. PRIVILEGES OF MEMBERS OF THE HOUSE OF COMMONS.

(A) FROM BEING HOLDEN TO BAIL.

1. THE KING V. JOHN WILKES, M. P. E. T. 1765. C. P. 2 Wils. 151.

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Members of the House of Commons are privileged from arrest, except in cases of treason, felony, and actual breach of the peace.

On the arrest and commitment of John Wilkes to the Tower, under a general warrant of the Secretary of State, the Court, on the return to an *habeas corpus*, was moved that he might be discharged, on the ground that the defendant was a member of parliament, and entitled to privilege to be free from arrest in all cases except treason, felony, and actual breach of the peace, and that therefore he ought to be discharged from imprisonment without bail. *Per Cur.* We are all of opinion that the defendant is entitled to the privilege of exemption from arrest, and must be discharged without bail. In the case of the seven bishops, the Court took notice of the privilege of parliament, and thought the bishops would have been entitled to it, if they had not esteemed them to have been guilty of a breach of the peace, for three of the judges

deemed a seditious libel to be an actual they were ousted of their privilege most described as a member of parliament in the of the law relative to the privilege of parliament to take notice of their privileges as being Coke, in 4 Inst. 25. says, that the privilege in three cases, viz. treason, felony and in the trial of the seven bishops the word was explained to mean where surety of parliament holds in informations for the accepted; and the case of an information a 4 Ann, was within the privilege of parliament lords and commons, anno 1675.) We are a breach of the peace; (*sed vide* Gow I Moore, 195; it tends to the breach of that which only tends to a breach of the 139. Suppose a libel to be a breach of privilege; because we cannot find in any book find sureties of the peace, nor ever was in of the seven bishops, where three of the was required in the case of a libel; but John the four, dissented, and we are bold to hold is not law; but it shows the miserable confusion on the whole, it is absurd to require surety of a libeller, and therefore the defendant onment. See Forts. 159; Ca. Temp H 2. HOLIDAY v. PITT. E. T. 1734. K. I 444; S. C. Forts. 159; 2 Stra. 985

This was a motion to discharge the defendant, because he, having been member of parliament, had been arrested by several *latitats* out of the court of K. B. within two days after the dissolution of parliament; alleged, was out. He was likewise charged with treason. The defendant removed himself in Hardwicke delivered it as in the unanimous were present at the arguments; that the dissolution of parliament; that it was not necessary if it was limited, or supposing it to be only if he was arrested within that convenient time,

* The exact period to be allowed, as an interval between these events, and the termination of the privilege, is not stated or defined. The judges, from a desire not to scrupulously abstained, whenever the question has been brought for judicial consideration on the subject. Indeed, the House of Commons, in respect, avoided deciding the limits of their privilege; the practice adopted and acted upon, appears to be 40 days before and 40 days after every session; Athol v. Derby, 2 Lev. 72; Holiday v. Pitt. Ca. S. C.; Forts, 159. S. C.; Jackson v. Kirton, 1 Com. 165; *sed vide* Barnes v. Ward, Sid. 29: from arrest, during the existence of the parliament; the prorogation of the House, according to the present practice, is for a certain number of days at a time.

It is clear that the members enjoy this privilege of parliament; that is, they are exempt from arrest for a certain number of days before and after the final dissolution of the parliament, to any part of the kingdom; Scobell, 88. 108; 1 Com. Rep. 446 S. C.; 2 Stra. 985. C. C.; see 35 H. 8. c. 11. 12.; and 13 W. 3. c. 3. The period *exundo et redeundo*, has not been distinctly defined, or illustrated by numerous decisions. In the

tute such an unity of possession as will extinguish a right of common, [693] the person must have an estate in the lands to which the common is annexed, and in those where the right of common exists, equal in duration.

When therefore a copyholder had a right of common in an adjoining manor *qua* copyholder, and he purchased that manor, the right was considered as still in existence.†

Every right of common may be extinguished by release of it to the owner of the soil, and a release of one acre will operate as an entire extinguishment of the whole right.‡

lord by forfeiture, the right of common became extinguished, and the regnant of it as a copyhold tenement, *cum pertinentiis*, did not recreate the right of common. A verdict was found for the plaintiff. A motion was now made to enter a nonsuit, which the Court refused to listen to: observing, when a copyhold tenement is seised into the hands of the lord, it does not therefore lose its right of common; for that right is annexed to all customary tenements demised or demisable by copy of Court roll; and while the estate remains in the lord it continues demisable. If, indeed, the lord grants the fee to a copyholder, it never can again become a copyhold estate, for it ceases to be demisable by court roll; as the case however stands, the rule must be refused.* See *Yelv.* 189; *Ow.* 122; *Poph.* 172; 2 *Brownl.* 47; 6 *Mod.* 20.

3. *REX V. HERMITAGE.* E. T. 1691. K. B. Carth. 241.

A right of common was appendant to certain tenements, which were parcel of the Abbey of Sarum in a common that was parcel of the duchy of Cornwall. Upon the dissolution of the Abbey of Sarum, these tenements became vested in king Henry 8. in fee, in whom the duchy of Cornwall was then vested, for want of a duke of Cornwall. Lord Holt, and the rest of the judges resolved, that this was not such an unity of possession as would destroy the right of common, because king Henry 8. had not as perdurable an estate in the one as in the other, for in the duchy of Cornwall the king had only a fee, determinable on the birth of a duke of Cornwall, which was a base fee; but in the tenements in question he had a pure fee simple, indeterminable, *jure coronæ*. See *Godb.* 4.

4. *REVELL V. SODRELL.* E. T. 1788. K. B. 2 T. R. 421.

It was argued by counsel in this case that a copyholder might, as such, have a right of common in an adjoining manor; but it could never be contended that by purchasing that manor he would extinguish forever the right of common incident to his copyhold, because that would injure the lord. The Court afterwards, in giving judgment on the particular facts of the case, did not controvert the propriety of such argument.

2d. *By release.*

MILES V. ETERIDGE. E. T. 1692 K. B. 1 Show. 358; 1 *Keb.* 499.

Trespass for throwing down fences; the defendant justified as a commoner. The plaintiff replied, that the defendant's father, under whom he claims, did give license for to make and continue the inclosure to him and his heirs, and issue was joined thereon, *utrum licentiavit modo et forma*. There was a verdict for the plaintiff. A motion was made in arrest of judgment, on the ground that this was an immaterial issue. *Per. Cur.* The Court took time to consider, but in the interim made of these expressions: it is ill by way of licence, but it is good by way of release of common; but a licence is determined by his death. A release of common in one acre is an extinguishment of the whole common.

3d- *By severance.*§

REVELL V. SODRELL. E. T. 1788. K. B. 2 T. R. 415.

In this case the Court held, that by a grant of a manor with an extraction of

* But if the lord of a manor alien his wastes, although the copyholder's right is not gone, the commonable soil is divested from his person; 18 *Ass. pl.* 4. So where the commoners of a manor had a right in the king's waste in a forest, and also another right in the lands of freeholders, the manor came into the king's hands, and so an unity was perfected; it was resolved, that although the privilege in the waste was not extinct as to the copyholders, yet that as to the lord, it was; *Sir Wm. Jones*, 349.

† It may be, however, presumed, says Mr. Woolrych in his *Treatise on Rights of Common*, p. 149. both from the general principle of law, which is, that the law works not any injury to persons, as well as from collateral authorities, that a descent of lands uniting both rights, would not in any case operate to a destruction of those rights.

‡ In the case of *Benson v. Chester*, 8 T. R. 401. *Ld. Kenyon* is reported to have said, that although that might be the case, where the release is made by one commoner, if it were so, in consequence of a release by all the commoners, there would long ago have been an end of almost all rights of common. and he expressed a wish to examine into the point before he subscribed even to the former position.

§ As, for example, by a dissolution of the estate to which the common belongs, as of

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So, when the lord of a manor en franchises his copyholder, having a right of common annexed to his customary estate, the tenant by accepting the fee loses his right.

But if he claim it in places with out the precincts of the manor,

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it belongs to the land and not to the estate, in which case if he enfranchise the common will continue without words of re grant.

Trespass. Justification for right of common. The case appeared to be this a copyholder by inheritance, to which common belonged by custom, purchased the freehold by these words, "grant, bargain, and sell the said messuage with all the commons thereunto belonging." The point now before the Court was, whether, by the acceptance of the grant, &c. the common was extinct? if it was. whether it could not be revived without a special grant? The Court said; the common is extinct by the new purchase, and then the purchaser of the freehold cannot have it without a special grant *de novo*. See Cro. Jac. 253; Yelv. 189; 1 Bulst. 2; 1 Brownl. 220; 2 id. 209; Noy. Rep. 136; Hob. 190; Gilb. Ten. 191; Dy 339.

2. CROWTHER v. OLDFIELD. H. T. 1705. K. B. 1 Salk. 170; S. C. 6 Mod. 19; S. C. but not S. P. 2 Ld. Raym. 1225. S. P. FIELD v. BOOTHBY, T. T. 1658. K. B. 2 Sid. 84.

Per Cur. A copyholder that has common of pasture in the wastes of the lord out of the manor, has the same as belonging to his land; and if he enfranchise the copyhold estate, still his common remains. In such case he must prescribe in the name of the lord, viz., that the lord of the manor, time out of mind, had common in such a place for himself and his customary tenants; but where a copyholder has common in the wastes within the manor, that belongs to his estate, and if the estate be enfranchised, the common is extinct. See Co. Ent. 9. 20

(B) AS TO THE SUSPENSION OF RIGHTS OF COMMON.*

It has been held, that where a person, having common appurtenant, takes a lease of part of the land, in which he has such right of common, all his common shall be suspended during the continuance of the lease; because it was the folly of the commoner to intermeddle with the land, over which he had a right of common; 8 Rep. 79. a.; 2 Ro. Rep. 345.

(C) AS TO THE REVIVAL OF RIGHTS OF COMMON.

In the consideration of when rights of common once extinguished or suspended will be revived, it will only be necessary to observe, that if a grant be made of all commons used or occupied with the land conveyed or leased, an extinguished right will revive; Cro. Eliz. 570. 594; 2 And. 168; 1 Bulst. 17. and when suspended, will again take effect by the removal of the cause of such suspension; see Godb. 4; Sir W. Jones, 285.†

* If a commoner inclose part of the waste in which he feeds his cattle; 1 Ro. Ab. 938; or if he disseises his lord; 16 H. 7. 11; Bro. Com. pl. 12; or if he be himself disseised; 19 H. 6. 33; or where a unity of possession takes place, which does not extinguish the common by reason of the inequality of the estate; ante, p. 693; in all these cases the right of common will be suspended. So it seems, that under the statutes for preserving wood in the king's forests, the commoner may, by giving his assent to an inclosure of woods, occasion a suspension of his right during the time specified by the acts; see 22 E. 4. c. 7; 35 H. 8. c. 17. s. 7. 9; 13 Eliz. c. 25. s. 18; 8 Rep. 136; Godb. 167; 2 Brownl. 289. 322; 4 Inst. 304, 1 Ro. Rep. 92; Sir W. Jones, 235; so if he happen to transgress the forest laws; Sir W. Jones, 282.

† Thus in the case of Bradshaw v. Eyre, Cro. Eliz. 570. the Court held that the words of the lease, "all commons, profits, &c. occupied or used with the said messuage," &c. operate as a grant of a new right of common. For although the common in the purchaser's hands, yet it was quasi common, used *quasi* common in the same common was used before, yet it was the *quasi* common; see Cro. Eliz. 794. Where common appurtenant to a messuage was extinguished by unity of possession in the lord's hands; it was held that a grant by the lord of the messuage, with all common appurtenant, did not pass the common extinct. But that a grant of all commons usually occupied with the said messuage would have place after an interruption of the right by the unity of the estate to which, &c. with the estate in which, &c. if the one be not of so perdurable a nature as the other, and become at any time severed. As if a parsonage having common appendant out of the lands of an abbot be appropriated to the abbacy, and be afterwards disappropriated: Godb. 4 Anon. et ante, p. 693. But this case only applies to appendant and appurtenant commons where they are appportionable, for where a person had common in gross, derived from the abbot of W., which was destroyed by unity of possession in the crown, with the lands in which the common was, and the crown granted the land to which the common belonged, with the words, *Tot, tanta, talia, libertatis, privilegia, et franchis, &c.* it was resolved, that being common in gross it was not revived;

Common Bail.***I. IN THE KING'S BENCH**

- (A) RELATIVE TO THE CASES WHERE
- (B) RELATIVE TO THE PERSONS FOR WHOM
- (C) RELATIVE TO THE TIME AND PLACE
- (a) By defendant, p. 697. (b) By plaintiff, p. 700.
- (c) As to the penalty for not filing bail, p. 701.
- (D) RELATIVE TO THE PENALTY FOR NOT FILING BAIL, p. 701.

II. IN THE EXCHEQUER
III. OF THE ATTORNEY GENERAL
MON BAIL, p. 701.

I. IN THE KING'S BENCH**(A) RELATIVE TO THE CASES**

1. It may be stated as a general rule, that if a party be arrested, common bail will suffice; but if the party may or may not be holden to bail, it is to be determined by the Court.

2. KITCHING v. ALDER. E.

On a rule to show cause why a writ of habeas corpus should not be granted, the Court said: if you apply for relief on bail, the Court can only refuse bail being filed.

(B) RELATIVE TO THE PERSONS

Common bail may be filed for a party, but it cannot be filed for an infant, with other defendants; see 1 Tidd

(C) RELATIVE TO THE TIME

(a)

1. Where the defendant has been arrested, or other process thereon, he must file bail within eight days after such return, 392; 5 Geo. 2 c. 271; which are reckoned as one of them, if it shows cause.

2. PRIGMORE v. BRADLEY. E. T.

On a bill of Middlesex, returns were filed common bail after the essoign term, and it was contended that the term was Michaelmas term preceding, until the first day of full term to come.

3. COULSEN v. SCOTT. N.

In an action against a husband and wife, the husband only being arrested, bail to justify for him alone. The Court said: bail to justify for the husband only, but not for the wife, ante, vol 4 p. 124 to 134.

for in that case every person who had been arrested as the abbot had, and so the common bail was sufficient.

* Filing common bail is an act or process, and effect as a common appearance. 724. n. 1. These bail are *nominal*, J. B. v. J. B.

† But this method of effecting an appearance is now obsolete. K. B. when plaintiff proceeds by original writ.

‡ These bail are entered on a piece of paper, stamped; but the 5 Geo. 4. repeals the Statute, and the piece is filed with the clerk of the Court, and is numbered as they are received; 3 T. B. v. J. B. defendant's attorney should deliver to the clerk a minute of his warrant, which must be

rights of many, therefore he may make reparation to none. On the contrary, the more extensive the injury, the more ought he to be bound to make compensation. The rule must be therefore discharged.—Rule discharged. See 9 Co. 113; 2 Bl. Rep. 1233; 2 Wils. 423; 4 T. R. 71; 1 Roll. Abr. 89. pl. 8. and 405; 2 Leon. 203; 2 B. & P. 86; Brownl. 197; 5 Co. 72. b.

7. *HOBSON V. TODD*. M. T. 1790. K. B. 4 T. R. 71.

Nor will it be sufficient for the defendant, if a commoner to show that the plaintiff has himself surcharged the waste.

Case by one commoner against another for surcharging. Defence, that the plaintiff had surcharged to a greater amount. After nonsuit on that ground, a motion was made for a new trial, because one tort could not be set off against another. The Court said: if we were not to set aside this nonsuit, it would be holding forth this doctrine to the public, that if one commoner, who happened to surcharge in a small degree, were injured in his right of common, he could not maintain an action against another who surcharged to a much greater degree; but that might be productive of the most mischievous consequences to all those persons who have rights of common. It is no objection to a commoner bringing such an action as this, that he himself has surcharged the common, though each person ought to recover damages in proportion to the injury which he receives; therefore the rule for setting aside the nonsuit must be made absolute.

8. *BENNET V. SPINKE*. Norfolk Sum. Ass. 1728. N. P. 1 Sel. 442. N. P. 6th ed.

* Any special matter of defence may be made use of in evidence although it was at one time considered necessary to plead it specially in an action on the case.*

In an action on the case against the defendant, plaintiff declared that he was possessed of a messuage to which a right of common for all commonable cattle was appurtenant, and that the defendant put his cattle on the said common, and also dug up part of it, *per quod* the plaintiff could not enjoy his common *in tam amplo modo*, as by law he might. As to putting in his cattle, plea, not guilty; and, as to digging up the common; justification, that it was to make a watering place necessary for drink for the cattle on the common. On the first issue, it was insisted, for the plaintiff, that the defendant could not give in evidence his right of common. But. *per Pengelly*, C. B. "in trespass *vi et armis* the only evidence of defendant, on not guilty, is, that he did not come on the ground, and a right to do so must be pleaded. But here the whole declaration is in issue, and so the *per quod* he could not enjoy *in tam amplo modo* as of right he ought, is part of the issue; and if defendant proves that he has a right, then, notwithstanding the plaintiff's complaint, he does enjoy, &c. as of right he ought. This point was settled by the Court of C. B. in a case I argued, which came before the Court on a motion for a new trial, in a cause tried at Cambridge before the present Lord Chr. King, then C. J. of C. B. who had ruled that the defendant could not give in evidence his right of common; and on motion for a new trial, *Tracey, J.* seemed surprised at it; and it was ruled otherwise by the Court, and a new trial granted."

6. *Of the witnesses*. *Vide ante*, p. 659.

7. *Of the verdict, &c.*

1. *INGLETON V. BURGESS*. M. T. 1683. Comb. 166; S. C. Carth. 65.

* And whatever goes to overturn the right claimed will consequently operate as a bar to the action. The lord of the manor in which the waste is, may, for instance, set up a defence of inclosure. Where the lord intends to defeat the claim of common on the plea that the place in question is his freehold, he should be prepared with old grants, deeds, leases, &c. as in an action of ejectment; and it will not be sufficient for him to prove leases made of some parcels of the waste, unless it appears that they are applicable to the whole. So owners of common fields may show a custom to inclose, which may be done by the production of old deeds, and the testimony of aged witnesses; 2 Wils. 269. The lord may show a long custom to erect a house on the waste, in exclusion of the commoners, or his tenants claiming under him, sued by a commoner, may prove a constant usage on the part of the lords of the manor to grant slips of land for the purpose of building, which is usually done with the consent of the homage. It will be presumed, on these occasions, that the lord, at the time of his original grants to his tenants, reserved these privileges especially for himself; 5 T. R. 417. Allotments under inclosure acts may also be evidence both at the instance of the lords and commoners, which will be more particularly mentioned hereafter under the title of "Inclosures." To destroy a plea of common of vicinage no further proof is needful than that the lord of either of the wastes has entirely inclosed some part, however small.

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Trespass was brought for taking turf and a prescription to have common. The plaintiff the defendant rejoined that an action had been joined, on the same prescription, which was estoppel. On which the plaintiff demurred introduced new matter into his prescription, the estoppel; but at another day judgment was given in favour of the plaintiff's declaration.

2. The damages must be governed by the declaration, and the form of action selects the rights.

8. *Of the cost*

1. *STYLEMAN v. PATRICK.* M. T. 1763. 2 L. R. 3 Keb. 3

In this case, which was an action on the declaration against the defendant for eating his grass with joy his common so beneficially as he had been, he should not have more costs than damages, in nature, and the judge had not certified that was the question. But it was resolved that this case was Charles; that if indeed it were a frivolous action, it would in time destroy the common: and, because the title could not possibly come in question.

2. *EDMONSON v. EDMONSON.* H. T.

A verdict passed for the plaintiff for an injury with one penny damages; and it pleased the court of Eliz. It was urged, on a rule to allow of standing the certificate, that this action was in the Court held that it was not so necessary to assert such a title or right to such an injury against a wrong doer, when no question of title; and therefore they ordered the rule to be granted. S. C. Freem. 214.

2d. *By distress*

3. *KENTICK v. PURGITER.* Cro. Jac. 208. 11 L. R. 187.

In this case it appeared that a custom was common for himself in a waste till Lammas should have common there, the lord being a tenant that the lord put in more than three, and the tenant a feasant. The issue on the custom being found for the plaintiff, it was moved, in arrest of judgment, that the defendant should have damages on his own ground, on which three judges (Croke, Js.) held the common good, and said that the best way to preserve their right and benefit was to give damages. C. J.) and another judge (Yelverton, J.) held that the lord's usage to distrain, should have been given. Noy, that judgment was in favour of the common. E. 3. 42; 1 Ro. Abr. 405.

2. *HALL v. HARDING.* E. T. 1768. K. B. 673; *S. P. ATKINSON v. TEASDALE.* 1 B. L. R. 817.

* When, however, the right is not restrained, the lord may distrain the lord's cattle; Godb. 182; Yelv. 104. N. B. 125. 126. In the present case, it is no reason, why commoners should be permitted to distrain, since it is held that even the copyholders of a manor have a several pasture of the lord's soil, to the exclusion of the lord. 2 Saund. 234.

The same rule holds in the case of fellow commoners;* but in both instances such a remedy can not in general be resorted to;†

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This was an action of replevin, for taking 51 of the plaintiff's sheep; the defendants avowed, saying, that one of them had a right of common in respect of 10 acres for two sheep on every acre; and because the plaintiff's sheep were injuring that right, they took them; the plaintiff pleaded in bar that he had eight acres of land in A., and that he put in two sheep for every acre, according to the limitation; to which the defendant replied, that over and above the 16 sheep which the plaintiff had a right to put in, they found 16 belonging to him, and that they distrained the supernumerary cattle. The plaintiff demurred. Lord Mansfield, in delivering the judgment of the Court, said: upon this demurrer, the point insisted on for the plaintiff was, that the defendant having no greater interest in the place in which, &c. than a mere right of common, he could not lawfully distrain the cattle of another commoner for any surcharge whatsoever; but that his proper remedy must be either by a writ of admeasurement of common, or by the usual action on the case. On the other hand, it was contended for the defendant, that this being a stinted right of common, the plaintiff might lawfully distrain the overplus. To deduce this conclusion it was, in the first place alleged as a general and established proposition, "that a commoner may undoubtedly distrain the cattle of a stranger;" and then it was urged, that, in all stinted rights of common, the supernumerary cattle have no colour of right to depasture upon the common; and therefore may properly be considered as the cattle of a mere stranger; and, as such, may be restrained by any of the commoners. It is, however, unnecessary to give any opinion as to the commoner's right of distraining where the number is absolutely certain; that is, where the commoner's claim is for 10, 20, or 30, without any relation to the quantity of land. For, in the present case, the prescription is for "two sheep for every acre of land;" and therefore the whole number is not absolutely certain in itself, but depends upon the number of acres which the commoner is possessed of. And there is this essential distinction between the two cases; that in the former, the overcharge is clear and self-evident, (for it requires no judgment or proof to decide whether 20 are more than 10,) and in such a right of common there would be no colour of right for the overplus number; but in the latter case, where the number of cattle to be pastured depends on the number of acres which the commoner is possessed of, it requires a medium to determine the proper proportion or number of cattle, that is, an admeasurement of the commoner's land. And when the question depends upon a collateral fact, or upon a matter of judgment, the party interested can never be a competent judge in his own cause.

* In the case of commoners, a writ of admeasurement, however, lies; *vide ante*.

† A commoner may, however, always distrain the cattle of a fellow commoner after admeasurement; per Bl. J. 3 Wils. 287; although as to the latter point, it has been holden, such a distress can be made only for the cattle doing damage on the distrainer's part of the land; for if there be a shack common (that is, an open common field, consisting of different parcels with inter-comings), of which every one knows his own parcel, and cattle be put on it at an improper season of the year, they can be distrained only by him on whose parcel of the common field they are damage feasant; 1 Roll. Abr. 665. But notwithstanding one commoner cannot distrain the surpluse, where another commoners puts on the common more cattle than are *levant et couchant* on his land; yet if a commoner were to purchase a quantity of cattle, and drive them immediately on the common without being at all upon his land, and he had no other cattle at the time on the common, it might be a question whether another commoner could not distrain them. On the one hand it may be contended, that if the commoner whose cattle are distrained brings an action of replevin, the issue would be whether the cattle were *levant et couchant* on his land, the affirmative of which he will be bound to prove. For to an avowry or plea damage feasant, the plaintiff must prescribe for a right of common for his cattle *levant et couchant* on his land, and aver that these cattle being *levant et couchant*, he put them on the common, upon which the parties will be at issue; but as the plaintiff cannot prove that fact, he would therefore fail; and it may be further said, that there is not any exercise of judgment necessary here to distinguish the cattle which are *levant et couchant* from those which are not so. On the other hand it may be said, and perhaps with better reason, that as the commoner put those cattle on the common under colour and pretence at least of a right, he cannot be called a stranger, and therefore another commoner cannot distrain them. However, if the law be so, it seems to follow, that in the case now put, the commoner can only traverse the averment of the levancy and couchancy of the cattle; though the contrary was adjudged in

3. WHITMAN v. KING. M.

Replevin was brought for taking cattle and the pleas in bar set out a right of comutual agreement between the plaintiff and any sheep, or other cattle, loose into certain there were covenants to that effect. The but the Chief Justice said, that the plaintiff right, and that, with regard to the avowant

4. HINCKES v. CLERK E. T. 1

Error on a judgment in replevin, recorded. It is here unnecessary to set out the deduced from them being merely that a common stranger put into a common. See 15 H. 3 pl. 39; F. N. B. 128; 9 Rep. 112; Godb. Sty. 482; Freem. 273,

5. CULLY v. SPEARMAN. H. 1

In this case the Court held, that a district common of pasture, to which two tenants was made jointly, on the ground that it was sessions, and not of their mutual estates.

VI. RELATIVE TO THE EXTINCTION AND REVIVAL OF RIGHTS

(A) AS TO THE EXTINGUISHMENT

1st. By unity of

1. PETERS v. LACY. M. T. 1693. K. 1

In this case many cases were cited to prove by unity of possession; and among the rest shall v. Hunter, Yelv. 189, was alluded to as a case where a man who had purchased a messuage for life having common, &c. purchased a messuage granted to him by the lord, *cum pertinentiis*. By unity of possession his common was destroyed by these general words *cum pertinentiis*. See E. 3. 25. 45; 7 H. 6. 3; Bro. Extinguishment. 128; Cro. Eliz. 570.

2. BADGER v. FORD. H. T. 1811

In this action, the foundation of which appeared that the messuage and land, in respect of which the common was claimed, had about 50 years ago vested in the defendant, who had regranted the same as a copyhold, with common, according to the custom of the manor. In the case of Atthill v. Atthill, Winch's Ent. 970. It, indeed, he should drive them among his other cattle, trained by another commoner along with some of his own, were *levant et couchant*, the issue would be for the cattle are distrained, because it then comes to a question of the manor, 346.

* It should seem also, that where a commoner may take the wheel-barrow, nets, oars, &c. in a general fishery it has been so adjudged; Cro. Car. 104.

† A right of common being an incorporeal hereditament, it cannot be divested. For though a person entitled to a right of common may be ousted of the enjoyment of it; yet by non-user only for a time, and not for ever, he loses his right, or interest therein.

‡ But the lord, it is presumed, cannot exercise his right of common, unless he can prove that where the common was taken comes by purchase to the commoner, it is not destroyed. See 2 Rep. 2; Sir W. Jones, 286.

§ So a shack common is not destroyed by the lord, unless the public good requires an user without inclosure to common *par cause de vicinage*.

To constitute such an unity of possession as will extinguish a right of common,

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the person must have an estate in the lands to which the common is annexed, and in those where the right of common exists, equal in duration.

When therefore a copyholder had a right of common in an adjoining manor *qua* copyholder, and he purchased that manor, the right was considered as still in existence.†

Every right of common may be extinguished by release of it to the owner of the soil, and a release of one acre will operate as an entire extinguishment of the whole right.‡

the tenement, in respect of which the action was brought, having vested in the lord by forfeiture, the right of common became extinguished. and the regrant of it as a copyhold tenement, *cum pertinentiis*, did not recreate the right of common. A verdict was found for the plaintiff. A motion was now made to enter a nonsuit, which the Court refused to listen to: observing, when a copyhold tenement is seised into the hands of the lord, it does not therefore lose its right of common; for that right is annexed to all customary tenements demised or demisable by copy of Court roll; and while the estate remains in the lord it continues demisable. If, indeed, the lord grants the fee to a copyholder, it never can again become a copyhold estate, for it ceases to be demisable by court roll; as the case however stands, the rule must be refused.* See Yelv. 189; Ow. 122; Poph. 172; 2 Brownl. 47; 6 Mod. 20.

3. *REX v. HERMITAGE*. E. T. 1691. K. B. Carth. 241.

A right of common was appendant to certain tenements, which were parcel of the Abbey of Sarum in a common that was parcel of the duchy of Cornwall. Upon the dissolution of the Abbey of Sarum, these tenements became vested in king Henry 8. in fee, in whom the duchy of Cornwall was then vested, for want of a duke of Cornwall. Lord Holt, and the rest of the judges resolved, that this was not such an unity of possession as would destroy the right of common, because king Henry 8. had not as perdurable an estate in the one as in the other, for in the duchy of Cornwall the king had only a fee, determinable on the birth of a duke of Cornwall, which was a base fee; but in the tenements in question he had a pure fee simple, indeterminable, *jure coronæ*. See Godb. 4.

4. *REVELL v. SODRELL*. E. T. 1788. K. B. 2 T. R. 421.

It was argued by counsel in this case that a copyholder might, as such, have a right of common in an adjoining manor; but it could never be contended that by purchasing that manor he would extinguish forever the right of common incident to his copyhold, because that would injure the lord. The Court afterwards, in giving judgment on the particular facts of the case, did not controvert the propriety of such argument.

2d. *By release.*

MILES v. ETERIDGE. E. T. 1692 K. B. 1 Show. 358; 1 Keb. 499.

Trespass for throwing down fences; the defendant justified as a commoner. The plaintiff replied, that the defendant's father, under whom he claims, did give license for to make and continue the inclosure to him and his heirs, and issue was joined thereon, *utrum licentiavit modo et forma*. There was a verdict for the plaintiff. A motion was made in arrest of judgment, on the ground that this was an immaterial issue. *Per. Cur.* The Court took time to consider, but in the interim made of these expressions: it is ill by way of licence, but it is good by way of release of common; but a licence is determined by his death. A release of common in one acre is an extinguishment of the whole common.

3d- *By severance.*§

REVELL v. SODRELL. E. T. 1788. K. B. 2 T. R. 415.

In this case the Court held. that by a grant of a manor with an extraction of

* But if the lord of a manor alien his wastes, although the copyholder's right is not gone, the commonable soil is divested from his person; 18 Ass. pl. 4. So where the commoners of a manor had a right in the king's waste in a forest, and also another right in the lands of freeholders, the manor came into the king's hands, and so an unity was perfected; it was resolved, that although the privilege in the waste was not extinct as to the copyholders, yet that as to the lord, it was; Sir Wm. Jones, 349.

† It may be, however, presumed, says Mr. Woolrych in his Treatise on Rights of Common, p. 149. both from the general principle of law, which is, that the law works not any injury to persons, as well as from collateral authorities, that a descent of lands uniting both rights, would not in any case operate to a destruction of those rights.

‡ In the case of *Benson v. Chester*, 8 T. R. 401. Ld. Kenyon is reported to have said, that although that might be the case, where the release is made by one commoner, if it were so, in consequence of a release by all the commoners, there would long ago have been an end of almost all rights of common. and he expressed a wish to examine into the point before he subscribed even to the former position.

§ As, for example, by a dissolution of the estate to which the common belongs, as of

the waste, they are thereby severed from t
continue to have a right of common therec
East, 279. 2 M. & S. 175.

nant for cattle, *levant et couchant*. may also be

4th. *By approve*

Where the lord exercises his privilege o
destroyed as to the part inclosed. The in
guishment can exist have been already not

5th. *By inclos*

GULLETT V. LOPES. H. T. 18

It appeared that the defendant, in an ac
his common, having, however, a drove o
side of it, so that the cattle from an adjoini
defendant's waste a common because of v
through that opening into the other waste
the vicinage was not excluded, and set asi
ant as bad in law. See 13 H. 7. 13; 11 J
174; 3 Keb. 24.

6th. *By enfranchi*

1. SPEAKER V STYANT. T. T

monasteries or corporate bodies; or for instance
which a right of common is claimable, &c.; se
136; Godb. 167. So where a person having c
or tenement, conveys away the messuage or te
create an extinguishment of the common; 1 Ro
user will operate to defeat a right of common
Bract. 223; Brit. 144; 3 Leon. 202. An inter
however seem, will not have the same effect; t

* So a common of estovers appendant or app
destroys the house, i. e. alters the nature of the
will be thereby severed from the thing to which
lose his estovers by enlarging his house, or buil
as by tempests, wildfire, &c. which may destro
ces not any man; 4 Rep. 86. But no act of t
extinguish the commoner's right to take them;
a reservation of the trees, &c. growing thereon
it was holden that such tenant might take the
judgment was given for him in an action for tre

† By 15 Car. 2. c. 17. s. 38. it was enacte
successors, and all persons having rights of co
might improve, set out, divide, and sever their
such proportions in severalty, at all times of th
this act, and as it appears, to the great impov
reign, this obnoxious clause was in part repea
great diminution of stock, and decay of house
sons had sold their shares of common from th
to a great increase of poverty; all future im
therefore, prohibited; but those had already t
2. c. 21. s. 4.) In a case where Ld. Harkwi
of a custom to dig turf in the lord's soil, he ex
that the lands had been severed from the man
by imagining that they could take turf as wel

‡ As the estate is in such case no longer c
toms relative to copyholds within the man
Such commonage will not pass by the word
ment. The right of commonage must be exp
will, under certain circumstances, decree its
For where the lord of a manor enfranchised
ing or appertaining, afterwards bought in all
common with the copyholder he had enfranc
decreed that he should hold and enjoy the sa
copyhold; see Cro. Jac. 253. d; 2 Brownl. 2
Salk. 170. 364; Moore, 667; Cro. Eliz. 51
however, seen, *ante*, p. 692. that as long
remains, the right of common incident theret
are regranted the common will revive.

[695] Trespass. Justification for right of common. The case appeared to be So. when this a copyholder by inheritance, to which common belonged by custom, purchased the freehold by these words, "grant, bargain, and sell the said messuage with all the commons thereunto belonging." The point now before the Court was, whether, by the acceptance of the grant, &c. the common was extinct? if it was, whether it could not be revived without a special grant? The Court said; the common is extinct by the new purchase, and then the purchaser of the freehold cannot have it without a special grant *de novo*. See Cro. Jac. 253; Yelv. 189; 1 Bulst. 2; 1 Brownl. 220; 2 id. 209; Noy. Rep. 136; Hob. 190; Gilb. Ten. 191; Dy 339.

2. CROWTHER v. OLDFIELD. H. T. 1705. K. B. 1 Salk. 170; S. C. 6 Mod. 19; S. C. but not S. P. 2 Ld. Raym. 1225. S. P. FIELD v. BOOTH-BY, T. T. 1658. K. B. 2 Sid. 84.

Per Cur. A copyholder that has common of pasture in the wastes of the lord out of the manor, has the same as belonging to his land; and if he enfranchise the copyhold estate, still his common remains. In such case he must prescribe in the name of the lord, viz., that the lord of the manor, time out of mind, had common in such a place for himself and his customary tenants; but where a copyholder has common in the wastes within the manor, that belongs to his estate, and if the estate be enfranchised, the common is extinct. See [696] Co. Ent. 9. 20

it belongs to the land and not to the estate, in which case if he enfranchise the common will continue without words of re grant.

(B) AS TO THE SUSPENSION OF RIGHTS OF COMMON.*

It has been held, that where a person, having common appurtenant, takes a lease of part of the land, in which he has such right of common, all his common shall be suspended during the continuance of the lease; because it was the folly of the commoner to intermeddle with the land, over which he had a right of common; 8 Rep. 79. a.; 2 Ro. Rep. 345.

(C) AS TO THE REVIVAL OF RIGHTS OF COMMON.

In the consideration of when rights of common once extinguished or suspended will be revived, it will only be necessary to observe, that if a grant be made of all commons used or occupied with the land conveyed or leased, an extinguished right will revive; Cro. Eliz. 570. 594; 2 And. 168; 1 Bulst. 17. and when suspendend, will again take effect by the removal of the cause of such suspension; see Godb. 4, Sir W. Jones, 285.†

* If a commoner inclose part of the waste in which he feeds his cattle; 1 Ro. Ab. 938; or if he disseises his lord; 16 H. 7. 11; Bro. Com. pl. 12; or if he be himself disseised; 19 H. 6. 33; or where a unity of possession takes place, which does not extinguish the common by reason of the inequality of the estate: *ante*, p. 693; in all these cases the right of common will be suspended. So it seems, that under the statutes for preserving wood in the king's forests, the commoner may, by giving his assent to an inclosure of woods, occasion a suspension of his right during the time specified by the acts; see 22 E. 4. c. 7; 35 H. 8. c. 17. s. 7. 8; 13 Eliz. c. 25. s. 18; 8 Rep. 136; Godb. 167; 2 Brownl. 289. 322; 4 Inst. 304, 1 Ro. Rep. 92; Sir W. Jones, 235; so if he happen to transgress the forest laws; Sir W. Jones, 282.

† Thus in the case of Bradshaw v. Eyre, Cro. Eliz. 570. the Court held that the words of the lease, "all commons, profits, &c. occupied or used with the said messuage," &c. operate as a grant of a new right of common. For although it was not common in the purchaser's hands, yet it was *quasi* common, used therewith; and though not the same common was used before, yet it was the like common; see Cro. Eliz. 794. Where common appurtenant to a messuage was extinguished by unity of possession in the lord's hands; it was held that a grant by the lord of the messuage, with all common appurtenant, did not pass the common extinct. But that a grant of all commons usually occupied with the said messuage would have passed such common as the first was; 2 And. 168; Moo. 467; Bulst. 17. A revival will take place after an interruption of the right by the unity of the estate to which, &c. with the estate in which, &c. if the one be not of so perdurable a nature as the other, and become at any time severed. As if a parsonage having common appendant out of the lands of an abbot be appropriated to the abbacy, and be afterwards disappropriated: Godb. 4 Anon. *et ante*. p. 693. But this case only applies to appendant and appurtenant commons where they are apportionable, for where a person had common in gross, derived from the abbot of W., which was destroyed by unity of possession in the crown, with the lands in which the common was, and the crown granted the land to which the common belonged, with the words, *Tot, tanta, talia, libertatis, privilegia, et franchis, &c. quot, &c. aliquis, &c.*, it was resolved, that being common in gross it was not revived;

A rule to show cause why judgment should not be set aside, the wife having never been served with process, was discharged, the service of the husband being held sufficient to authorise the plaintiff entering common bail for himself and a wife.

5 CLARK V. NORRIT. E. T. 1789. C. P. 1 H. Bl. 235.

The defendant and his wife were joined in the writ; he entered an appearance for himself only: the plaintiff signed judgment without demanding a plea. On motion to set it aside, it was contended that the judgment was regular, inasmuch as the defendant ought to have entered common appearance for himself and his wife. But the Court held the judgment irregular, and that a demand of plea was necessary.

(b) By plaintiff according to the statute.

For the words of the statute, see *ante*, vol. 1. p. 725.

1. SMITH V. PAINTER. M. T. 1788. K. B. 2 T. R. 719.

Application to set aside a judgment. It appeared that the writ was returnable the 29th December, as of the first return of Hilary term. Notice of declaration was delivered on the 5th of May, as of Easter term; but common bail not being filed, the plaintiff filed it according to the statute on the 3d of June; and a rule to plead being given, the plaintiff signed judgment for want of a plea.

But the Court said, the bail ought to have been filed in the term when the writ was returnable, and not in the term following.—Rule absolute.

defendant filed by the plaintiff. ought to be of the term in which the writ is returnable and not of the following term.

2. PRIGMORE V. BRADLEY. E. T. 1805. K. B. 2 Smith, 405; S. C. 6 East, 314.

The plaintiff proceeded by bill, returnable the first return of Michaelmas term; and the return was not entered till the 22d of January, after the essoign day of Hilary term, the day before the commencement of full term. On motion to set aside a judgment of *non pros* the question was, whether an appearance so entered could be filed as of Michaelmas term preceding? And the Court said, that until the commencement day of full term, the 23d of January, the party was at liberty to enter his appearance as of the antecedent term.

3. DAVIS V. HUGHES. E. T. 1797. K. B. 7 T. R. 206.

The writ was returnable in Trinity term, at which time the defendant gave a *cognovit*; but judgment had not been signed till Hilary term; after which, in the same term common bail was filed; this was contended to be irregular. But the Court said, the irregularity was waived by the *cognovit*; and that it was quite sufficient that judgment now appeared to have been regularly entered up; the plaintiff having since filed, common bail *nunc pro tunc*, for the defendant. filed of the term subsequent to that in which the writ is returnable *nunc pro tunc*.

4. DOO V. BUTCHER.—E. T. 1790 K. B. 3 T. R. 611.

On a rule to set aside proceedings, it appeared that the declaration was against the defendant, by the name of *Thomas*, and the writ *John*; to which it was replied, that as common bail was filed by the name of *Thomas*, his right name, no advantage could be taken. In support of the rule it was admitted, that as the plaintiff had filed common bail for defendant, according to the statute, it was competent to him to rectify the original mistake. And of that opinion were the Court.

5. DELANCY V. CANNON. M. T. 1808 K. B. 10 East, 327.

On a rule to set aside proceedings, it appeared that the writ had been sued out by the name of *John*, and common bail filed against him by the same name, and then the plaintiff declared against him by the name of *Robert*, his real name sued by the name of *John*. The Court held the proceedings irregular, and made the rule absolute.

* Yet in the case of *Russell v. Buchanan*, cited *Man*, *ex Addend.* 625; where an appearance was entered for the husband only, who disclaimed any interference, and an appearance was entered for the wife according to the statute; and the plaintiff suing them jointly, in his right the husband filed his plea only. The Exchequer refuse to set aside a judgment signed for name it is want of a plea.

† But if the writ and declaration be against the defendant in his right name, common bail

But when the husband alone has been served with a process, he ought to file common bail for both.

Though where he entered common bail for himself only, it was holden that the plaintiff could not sign judgment without demanding a plea.*

[699] Common bail for the

But it has been holden that it may be filed before the *quarto die post* of the first return of the following term,

And in order to warrant a judgment on a *cognovit*, common bail may be

And if the defendant be sued by a wrong name, and the plaintiff file common bail for him in his right name;

Or if he file common bail for him in the name by which he is sued,

and declare against him in his right name it is irregular.†

6. COX v. BUCKWELL. T. T. 1822. K. B. 5 B. & A. 892; S. C. 1 D. & R. 545. [700]

The plaintiff having sued out a writ against four defendants, for separate causes of action, and filed separate declarations against three of them conditionally, and given three separate rules to plead, afterwards entered a common appearance, according to the statute, for all the three defendants jointly, and signed three separate interlocutory judgments for want of a plea. The Court held this to be irregular; for by declaring separately against the three defendants, the plaintiff had made three separate causes, and had thereby elected to proceed separately; and, by the practice of the Court, he ought to have entered a separate appearance for each of them.

And where plaintiff is sued one writ against several defendants, and filed separate declarations, it was held en that he could not afterwards enter a joint appearance.

7. WANSEY v. MORE. M. T. 1792. K. B. 5 T. R. 65.

On showing cause against a rule for setting aside interlocutory judgment, because it appeared to have been signed on the 2d of November, and common bail was not filed by the plaintiff till the 3d, it was sworn that the judgment was not in fact signed until after common bail was filed; and the Court, after consulting the master, said it was the established practice to sign judgment on the 2d November, before the assign day, in all cases where common bail is filed between the 2d and 6th of November.

In all cases where the plaintiff has been filing

common bail for the defendant, between the 2d and 6th November, is entitled to judgment, it is signed as of the day before the assign day (3d November,) of M. T.*

(c) *As to the penalty for not filing common bail.*

The rule for the penalty of 5l. for not filing common bail in time is absolute in the first instance.

WHITE v. HOLLAND. H. T. 1726. K. B. 2 Stra. 737.

In this case it was resolved, that the rule for the payment of 5l. for not filing common bail, according to the 9 & 10 W. 3. c. 25.† should be made absolute in the first instance, the words of the statute being, that the Court shall immediately award judgment, whereon the plaintiff may take out execution. See 5 Mod. 392.

(D) RELATIVE TO THE APPLICATION FOR DISCHARGING ON COMMON BAIL.

The defendant, when entitled to be discharged on common bail, must make an application to the Court, or a judge at chambers; see Tidd, 502, 7th ed.

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II. IN THE EXCHEQUER, &c.

In the Exchequer the practice, as regards common bail, is the same as in the K. B., and in the Common Pleas there is no common bail, but a common appearance is entered; see *ante*, vol. 1. from 722 to 728.

III. OF THE ATTORNEY'S UNDERTAKING TO FILE COMMON BAIL.

See *ante*, vol. 1. from p. 727 to 728.

An attorney by not entering an appearance pursuant to his undertaking, renders himself liable to an attachment; see Mould v. Roberts, 4 D. & R. 719.

Common Council. See tit. *Corporation*.

Common Counts.

filed for him by the plaintiff according to the statute in a wrong name may be amended; Wheston v. Packman, 3 Wils. 49. abridged *ante*, vol. i. p. 726.

* By Reg. Gen. E. T. 1657, it is ordered, that all clerks, &c. do within 10 days after the end of every term, deliver to the secondary a note of all such appearances as have been made unto them before, and by whom they were made, so that the person appointed to enter the bails may see whether they are filed for every such appearance or not. And by Reg. Gen. 1736. 2. Stra. 1027. it is ordered, that in all cases where common bail shall be filed by the plaintiff for the defendant, by virtue of the act, these words shall be written on the bail piece, viz. *filed according to the statute*, or words to the like effect. And by 51 Geo. 3. c. 124. and 57 Geo. 3. c. 101. if the defendant, on being personally served with the summons or attachment by original, do not appear at the return of such writ, or of the *distringas*, as the case may be, or within eight days after the return thereof, the plaintiff upon affidavit being made and filed in proper court, of the personal service of such summons, or attachment, or of the due execution of such *distringas*, &c. may enter a common appearance for the defendant, and proceed thereon as if he had himself entered his appearance. And by the Mutiny Acts, a common appearance may be entered by the plaintiff in actions against volunteer soldiers; see 53 Geo. 3. c. 17.

† Which imposes that penalty for not filing common bail in time.

See tits. Annuity, Arbitration and Award, Assumpsit, Bankrupt, Bills and Notes, Charter-party, Composition with Creditors, Contract, Contribution, Covenant, Declaration, Frauds, Statutes of, Goods sold and delivered, Guarantee, Insurance, Money lent, Money paid, Money had and received, Party-wall, School and Schoolmaster, Tolls, Wager, Warranty.

Common Informer. See tits. *Informers*; *Penal Actions*; *Qui tam Actions*.

Common Pleas. See tit. *Courts*.

IMPY v. TAYLOR. H. T. 1814. K. B. 3 M. & S. 166.

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The word, "his Majesty's Court of the Bench at Westminster," apply to the Court of K. B. would have been, wheresoever, &c. See *Rex v. Lennard*, 1 Show. 302.

Common Pleas at Lancaster. See tits. *Courts*.

Common Recovery. See tits. *Fine and Recovery*.

Common Scold. See tits. *Barrestry*. *Scold*, *Slander*.

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I. AS TO THE MODE OF SUING MEMBERS OF THE HOUSE OF COMMONS.

As the course which the plaintiff is to adopt on suing a member of the House of Commons is similar to that which is to be pursued on proceeding against a peer, in order to avoid unnecessary repetition, the cases on the subject will be collected under tit. *Parliament*.

II. PRIVILEGES OF MEMBERS OF THE HOUSE OF COMMONS.

(A) FROM BEING HOLDEN TO BAIL.

1. THE KING v. JOHN WILKES, M. P. E. T. 1765. C. P. 2 Wils. 151.

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Members of the House of Commons are privileged from arrest, except in cases of treason, felony, and actual breach of the peace.

On the arrest and commitment of John Wilkes to the Tower, under a general warrant of the Secretary of State, the Court, on the return to an *habeas corpus*, was moved that he might be discharged, on the ground that the defendant was a member of parliament, and entitled to privilege to be free from arrest in all cases except treason, felony, and actual breach of the peace, and that therefore he ought to be discharged from imprisonment without bail. *Per Cur.* We are all of opinion that the defendant is entitled to the privilege of exemption from arrest, and must be discharged without bail. In the case of the seven bishops, the Court took notice of the privilege of parliament, and thought the bishops would have been entitled to it, if they had not esteemed them to have been guilty of a breach of the peace, for three of the judges